No. 373

Office Supreme Court
AUG 13 19
JOHN J. FEY, CL

United States Court of Appeals

FOR THE FIRST CIRCUIT

ISADORE ABERLIN, Plaintiff-Appellant, JAMES ZISMAN, *et al.*, Defendants-Appellees.	No. 5218
ISADORE ABERLIN, Plaintiff-Appellant, JAMES ZISMAN, *et al.*, Defendants-Appellees.	No. 5222

APPENDIX TO APPELLANT'S BRIEF

RICHARD L. WILDER,
11 Beacon Street,
Boston, Mass.

DORA ABERLIN,
11 Broadway,
New York, New York.
Attorneys for Plaintiff-Appellant.

INDEX

	PAGE
Docket Entries	1a
Bill of Complaint	5a
Answer of Defendant James Zisman	6a
Answer of Defendant Lenore A. Zisman	7a
Testimony	8a
James Zisman—Direct	8a
Lenore A. Zisman—Direct	16a
Lenore A. Zisman—Cross	21a
Dorothy Gail Aberlin—Examination by the Court	23a
Selma Aberlin—Cross	24a
Isadore Aberlin—Direct	27a
James Zisman—Direct	32a
James Zisman—Cross	33a
Charge to the Jury	35a
Further Charge to the Jury	40a
Extracts from Deposition of Alice M. Amero	41a
Plaintiff's Request That the Court Instruct the Jury on the Law as Set Forth in the Following Requests	46a

PAGE

Plaintiff's Exhibit 1 ..... 49a

Plaintiff's Exhibit 2 ..... 52a

Plaintiff's Exhibit 3 ..... 53a

Plaintiff's Exhibit 5 ..... 55a

Plaintiff's Exhibit 6 ..... 57a

Plaintiff's Exhibit 7 ..... 57a

Plaintiff's Exhibit 8 ..... 59a

Judgment 60a

Plaintiff's Notice of Appeal from Judgment 61a

Plaintiff's Motion for a New Trial 61a

Plaintiff's Notice of Appeal from Order 62a

Docket Entries.

United States District Court

DISTRICT OF MASSACHUSETTS

I, JOHN A. CANAVAN, Clerk of the United States Disrict Court, District of Massachusetts, do hereby certify that the following entries are on the Civil Action Docket in the cause entitled:

Civil Action No. 56-215-S

ISADORE ABERLIN

v.

JAMES ZISMAN and LENORE ZISMAN

1956		
Mar.	8	Complaint (Jury trial claimed) filed Summons issued
	15	Summons retd by Marshal served Mar. 12, 1956 filed
Apr.	2	Answer of deft. James Zisman filed
	2	" " " Lenore Zisman filed
	24	Plaintiff's notice of taking deposition of John Porter, M. D. filed
	24	Plaintiff's notice of taking deposition of John MacKenzie, M. D. filed
May	24	Depositions of Dr. John Porter III and Dr. John M. MacKenzie filed
June	19	Plaintiff's notice of taking deposition of the Commissioner, Department of Mental Health filed, Subp. issued
	19	Plaintiff's notice of taking deposition of Selma D. Aberlin filed Subp. issued
	19	Plaintiff's notice of taking deposition of the Commission, Department of Mental Health filed, Subp. issued

1956

June	19	Plaintiff's notice of taking deposition of Selma D. Aberlin filed
	19	Plaintiff's notice of taking deposition James Zisman, filed
July	30	Deposition of Alice M. Amero filed
	30	Deposition of Selma D. Aberlin, filed
	31	Plaintiff's notice of taking deposition of Kathryn Meredith of N. Y. at N. Y. Aug. 13, 1956 filed (addressed to James Zisman, deft. pro se.)
	31	Plaintiff's notice of taking deposition of same party, same date, same time, filed (addressed to James Zisman, Esquire, for deft. Lenore Zisman)
Aug.	15	Plaintiff's motion to compel deft. James Zisman to make true and proper answer to oral depositions filed
	15	Plaintiff's notices (2) to take deposition of Catherine Meredith of N. Y. Aug. 29, 1956 filed
Sept.	17	Sweeney, Ch J. Hearing on plaintiff's motion to compel deft. James Zisman, to make true and proper answer to oral depositions, taken under advisement.
	19	Sweeney, Ch J. Memorandum. The plaintiff's motion is allowed as to prayers (a) and (b) but is denied as to prayer (c); defendants ordered to pay to the plaintiff costs in the sum of $100.00. Mem. filed. Copies mailed to counsel Sept. 19, 1956.
Sept.	22	Plaintiff's notice of taking deposition of deft. James Zisman Esq. filed.
Oct.	1	Sweeney, Ch J. Order, in accordance with the Memo. of the Court, allowing motion as to prayers (a) and (b) but denying motion as to prayer (c) and defts to pay to the plaintiff costs in the sum of $100.00 on or before Nov. 1, 1956. Order filed. Copies mailed to counsel Oct. 1, 1956

1956

Oct. 30 Sweeney, Ch. J, Hearing relative to deposition. Ordered defendant to state reasons why child was not properly cared for.

30 Sweeney, Ch J. Ordered payment of costs deferred until trial.

Nov. 30 Plaintiff's motion for writ of protection filed.

30 Sweeney, Ch. J. Plaintiff's motion for writ of protection allowed.

30 Writ of protection issued.

Dec. 4 Sweeney, Ch. J. Jury trial begins : jury empanelled, Virginia Lougee, Foreman, evidence adjourned to Dec. 5, 1956.

Dec. 5 Sweeney, Ch. J. Jury trial continues; evidence, defendant's motions (2) for directed verdict filed and taken under advisement. Plaintiff's requests for ruling filed. Arguments. Charge: deliberation committed to Jury; verdict for defts. Verdict filed.

6 Sweeney, Ch J. Judgment after trial and in accordance with the verdict of the jury for the defendants with costs taxed at . Judgment filed. Copies mailed Dec. 6, 1956.

7 Writ of protection returned by Marshal with Marshal's notice of issuance etc., thereon filed. Defendant's motion for counsel fees filed.

Dec. 14 Plaintiff's motion for new trial filed.

17 Notice of appeal filed by the plaintiff. C of n/a given in hand to James Zisman. Bond for costs on appeal filed (Indemnity Ins. as surety thereon)

26 Sweeney, Ch J. Hearing on defendant's motion for counsel fees, motion denied.

26 Sweeney, Ch J. Hearing on plaintiff's motion for new trial motion denied.

Docket Entries.

1957

Jan. 21 Original papers for record on appeal delivered to the U. S. Court of Appeals.

22 Order of Court from the U. S. Court of Appeals "Upon motion of appellant, it is ordered that the time for filing the record on appeal and docketing this case be and the same hereby is enlarged to and including Feb. 26, 1957."

23 Notice of Appeal filed by plaintiff. Copy of n/a mailed to James Zisiñan, Esq., 646 Warren St. Roxbury 21, Mass.

24 Clerk's certificate in re 2nd notice of appeal delivered to the U.S.C.A.

Feb. 19 Stenographic records of trial (2 vols) on Dec 5 & 6, 1956 filed.

26 Supplemental certificate delivered to the U. S. Court of Appeals.

Bill of Complaint.

The plaintiff complaining of the defendants says and alleges:

1. That the plaintiff is a citizen of the State of New York, residing in the County of New York, City of New York, and the defendants are residents of the State of Massachusetts, residing at Marjorie Road, in the Town of Stoughton, State of Massachusetts.

2. That the plaintiff is the father of Dorothy Gail Aberlin, an infant eleven years of age.

3. That on or about April 1, 1955 for sometime prior thereto the plaintiff had and was entitled to the custody of his said minor daughter, Dorothy Gail Aberlin, and said infant was on said date residing with him in his home at 165 W. 20th Street, in the said City of New York.

4. That prior to April 1, 1955 the defendants did conspire to kidnap your plaintiff's infant daughter and thereafter on April 1, 1955 the defendant, James Zisman, maliciously came into the State of New York and without notice to your plaintiff and without his assent did kidnap and take from the State of New York your plaintiff's said minor daughter, Dorothy Gail Aberlin, and did transfer her to and keep her within the Commonwealth of Massachusetts against the will and wishes of your plaintiff.

5. That as a result of the wrongful and malicious acts of the defendants herein complained of and as a direct consequence of their unjustified disregard for your plaintiff's rights, your plaintiff has been wrongfully and wholly deprived and robbed of the security,

love and affection of his said minor daughter and is still being so deprived of her companionship and assistance; that he has been and still is being deeply aggrieved and depressed and suffered untold embarassment and despair and has been and still is being suffer cruel and excruciating mental anguish, harrassment and despair and has been and still is being compelled to spend large sums of money to gain back the custody of his infant daughter, all to his great and serious loss and damage in the sum of $250,000.00.

WHEREFORE, your plaintiff demands judgment against the defendants in the sum of Two Hundred & Fifty Thousand ($250,000.00) Dollars, besides costs.

A trial by Jury is demanded.

ISADORE ABERLIN.

(Verified March 6, 1956.)

RICHARD L. WILDER,
Attorney for Plaintiff,
11 Beacon Street, Boston, Mass.

Ca 7-3848

Answer of Defendant James Zisman.

Now comes the defendant, James Zisman, in the above entitled action and for Answer to the Complaint says as follows:

1. The Defendant admits the allegations set forth in Paragraph 1.

2. The Defendant admits the allegations set forth in Paragraph 2.

3. The Defendant denies the allegations set forth in Paragraph 3.

4. The Defendant denies the allegations set forth in Paragraph 4.

5. The Defendant denies the allegations set forth in Paragraph 5.

The Defendant further answering says that the Plaintiff has instituted the present proceedings in an attempt to circumvent the Statutes, Decrees, Findings and Orders of the Courts of the Commonwealth of Massachusetts.

The Defendant further answering says that the present proceedings have been instigated by Dora Aberlin, a member of the New York Bar, with offices at 11 Broadway, New York City, and a sister of the plaintiff, with the sole purpose of harassing the Defendant.

N.B

WHEREFORE THE DEFENDANT PRAYS:

1. That the Complaint be dismissed and Judgment entered for the Defendant.

2. That the Plaintiff be ordered to pay all costs of these proceedings, including reasonable counsel fees.

3. For such other and further relief as to this Honorable Court may be deemed meet and proper.

JAMES ZISMAN
James Zisman
Pro. Se

Answer of Defendant Lenore A. Zisman.

(Identical to answer of James Zisman.)

(2) Mr. Wilder: I would like to read into the record the deposition of one Alice M. Amero, taken at Boston, June 29, 1956, in the presence of Mr. Zisman and myself.

(3) JAMES ZISMAN, Sworn.

Direct Examination by Mr. Wilder:

Q. Will you please state your name, sir? A. James Zisman.

Q. Where do you live, sir? A. 121 Marjorie Road, Stoughton, Massachusetts.

Q. What is your occupation? A. I have been an attorney, as of last month, for 28 years.

(4) The Witness: I think I met the plaintiff once or twice at 1687 Commonwealth Avenue, at which time I was calling on my present wife. You asked me that question, I have to answer it.

Q. I just asked you how long. A. Oh, it was a matter of, maybe some six years ago, or so. I think I met him once or twice.

Q. When did you next meet the plaintiff, Mr. Zisman? A. I did not meet him after that, I spoke to him.

Q. So from the time you first met him six years ago, up until April 1st, 1955, had you ever personally met the plaintiff? A. No.

Q. Up until April 1st, 1955, had you ever been in the plaintiff's home in New York City? A. No.

Q. Did you know where that home was? (5) A. I was informed that it was in--if I can refresh my recollection (consulting papers).

* * *

Q. On or about March 25, 1955, did you know that the plaintiff's daughter Gail was living with her father, yes or no? A. No.

Q. You didn't know she was living with her father? A. I knew that she was living in the same apartment.

* * *

Q. Mr. Zisman, did you on or about the 25th of March prepare a petition, such as that? A. Yes, I did.

Q. Is that a true copy of that petition? (6) A. There is no question about it.

Q. Did you and your wife, in your presence, sign that petition? A. Yes.

* * *

Q. Mr. Zisman, did you personally prepare this petition? A. Yes, I did.

Q. Again I will ask you if this child was residing with her father, did you know? A. Well, if she was in the same household with her father and her aunt and another uncle.

(7) Q. Did you not in personally preparing this petition state, said minor child is temporarily residing with her father but is not being properly cared for? A. That is correct.

Q. Now, Mr. Zisman, how many times had you been in the home in which this child had been residing prior to your filing this petition? A. I have never been there.

* * *

(8) Q. Did you ever at any time call the father to inquire as to the circumstances under which the child was living? A. No.

* * *

Q. And you want this Court and jury to believe they both told you that the child was being improperly cared for? A. I didn't say that. I was asked to describe the apartment. I believe I have done so.

Q. Did they tell you the child was being improperly cared for? A. No statement was made to me other than from Miss Meredith, she told me, she didn't think, under the circumstances, the child was very happy there. There was nobody to look after her. She was with adults. She felt she ought to be around with the children her own age.

Q. Did you at any time advise the father that you were intending (9) to present a petition for temporary custody of his child? A. No.

Q. Did you not think it advisable that you do it? A. Under all these circumstances—

Q. Yes or no, please. A. Under the circumstances, no.

Q. Did you give the father any notice you intended to ask for custody? A. I informed him about it.

Q. Did you inform him the date you intended to be at court? A. No, I did not.

Q. You knew where the father was living? A. I had that information, yes.

Q. You know that the father was represented by his sister? A. That is not true, not at that time.

Q. Nevertheless, you presented this petition without the father being present, too? A. I have answered that.

The Court: He has already said that.

Q. As a result of that petition, an order was secured? A. That is right.

Q. Granting your wife temporary custody? A. That is right.

Q. On or about April 1st, 1955, did you go to New York? A. Yes, I did.

(10) Q. And with whom did you go? A. I went by myself.

Q. And how did you get there? A. I went there by train.

Q. And what time did you arrive? A. Oh, sometime in the forenoon, I don't recall the exact time.

Q. Well, approximately what time? A. I don't recall right now; some time in the forenoon.

Q. About 11 o'clock would you say? A. It could have been about that time, yes, 11 or 12 sometime.

Q. Upon arriving in New York, where did you go? A. I went to see Miss Meredith.

Q. Where is that? A. That is 57 West 50th, I think it is 57 West 35th Street, I am not positive of the address. It is right in New York City.

Q. You say West 35th Street? A. I can give it to you accurately if you give me a moment.

Q. It isn't necessary. Did you there request Miss Meredith to accompany you to the child's school? A. Yes, I did.

Q. Miss Meredith went with you to the school? A. Yes.

Q. And waited for the child to come out? A. Yes.

Q. You waited at one door and she waited at the other?

(11) A. She told me there were different exits and she suggested, she did not know what exit she might come out, that is right.

Q. What exit did the child come out, the exit you were waiting at? A. No, where Miss Meredith was, as I recall it.

Q. You then went with the child to a bus station, did you not? A. That is right.

Q. And you boarded a bus with the child? A. That is right.

Q. To New Jersey, was it? A. That is right.

Q. Now did you at any time after arriving in New York, call the father? A. No.

Q. Did you at any time upon arriving in New York, call the aunts of the child? A. No.

Q. Did you at any time endeavor to call the home where the child resided? A. I personally did not. I asked Miss Meredith to try to contact them by phone. She was unable to do so. I personally did not.

Q. Did you go with the child to her home, to pick up her clothing? A. No.

(12) Q. You went directly from the school to the bus stop? A. That is right.

Q. You took the child to New Jersey? A. That is right, to my brother's home.

Q. Upon boarding the bus, did you not direct Miss Meredith to send the telegram to the father, after you had left the State of New York? A. It was prior to my leaving.

Q. I show you this telegram and ask you if this is a copy of the telegram which you directed, if that is the original? A. Yes, that is the original, no question about it.

Q. And when did you tell Miss Meredith to send the telegram? A. It was at the time we were in the bus stop. I don't remember the exact minute.

Mr. Wilder: I offer this in evidence, your Honor.
The Witness: All right.

(Telegram, April 1, to Isadore Aberlin from James Zisman, marked Plaintiff's Exhibit No. 2 in evidence and read to the jury by Mr. Wilder.)

Q. Did you then direct Miss Meredith to mail a letter? A. At the same time.

Q. And you gave Miss Meredith, while you were boarding the bus or in the bus station, a letter to mail to

the child's father? A. The same time as the telegram, yes.

Q. Is this a reasonable facsimile of the letter you directed Miss Meredith to mail to the child's father? (13) A. There is no question about it.

Mr. Wilder: I offer this in evidence as Plaintiff's Exhibit 3, please.

(Photostat, letter dated March 31, 1955, James Zisman to Isadore Aberlin, marked Plaintiff's Exhibit No. 3 in evidence and read to the jury by Mr. Wilder.)

Q. What day, Mr. Zisman, did you arrive back in Boston? A. It was the next day, I think it was the 2d of April.

Q. You spent the preceding night in New Jersey, did you not? A. That is right.

Q. And on that day, following April 1st, which would be April 2d, you again returned to New York City with Gail? A. Yes, we met Miss Meredith. She had her parakeet. She wanted to take that with her. We met her at the railroad station. We continued on.

The Court: Where did you stay in New Jersey?

The Witness: At my brother's home, being close—

The Court: That is all I asked.

Q. While in New Jersey, did you call Mr. Aberlin? A. I did not.

Q. Did you have any knowledge whether Mr. Aberlin knew where his daughter was? A. I had no personal knowledge, no.

Q. But you did not think it prudent to call the father and tell him where his daughter was? A. I thought I had in-

formed him very adequately, sufficiently (14) so he would not be disturbed about the situation. I thought I did everything that was proper.

Q. You thought you did everything that was proper? A. That is right.

Q. By taking the child from school? A. That is right.

Q. Did you seek to enforce the Suffolk order in any court in New York City? A. I will have to object to that, if your Honor please.

The Court: I will sustain the objection to that.

Q. Did you go with any officer to the school at the time you first met the plaintiff's daughter?

The Witness: I will object to that, if your Honor please.

The Court: I will sustain the objection. You were asking for legal things. Those are not proper. Let us bring out the facts in the case.

Q. Was any order ever made directing Mr. Aberlin to pay you or your wife $25 a week?

The Witness: I object to that, if your Honor please.

The Court: I will overrule the objection.

Q. Was any order ever made? A. No.

Q. Did you at any time ever write Mr. Aberlin a letter stating that the court orders him to pay Mrs. Zisman $25 a week? (15) A. Not to my knowledge. I wrote a couple of letters.

Q. Did you ever write that letter there? A. Show it to me. (Witness examines paper.) Yes, I wrote that letter and several others. Do you have the others, too?

Mr. Wilder: I will offer this as Plaintiff's Exhibit No. 4.

(Photostat, letter dated April 8, 1955, James Zisman to Isadore Aberlin, marked Plaintiff's Exhibit No. 4 in evidence and read to the jury, by Mr. Wilder.)

Q. Now, Mr. Zisman, was any court order ever made ordering Mr. Aberlin to pay Mrs. Zisman $25 a week? A. There is nothing in that letter that so indicates.

The Court: An order previously made.

Q. For how long did Gail live with you? A. She lived with us until October of that year.

Q. And then at some time subsequent to that was the order awarding Mrs. Zisman temporary custody, revoked? A. No, it was prior to that. That was in September of the same year, prior to her leaving us.

* * *

(16) Q. Mr. Zisman, I show you this photostatic copy of a petition also filed in the Suffolk County Probate Court. Did you prepare this petition for Mrs. Zisman's signature? A. Yes, I did.

Mr. Wilder: I offer this in evidence as Plaintiff's Exhibit No. 5.

* * *

(20) LENORE A. ZISMAN—Direct.

Q. What did you find out as to the circumstances under which she went to the— A. Yes, I did.

Q. Will you please relate to the Court and jury what those circumstances were? A. Well, I do not know how you want me, where you want me to start from.

Q. This is following that notice, you found out the circumstances under which she went to the hospital? A. Only what Miss Meredith told me.

Q. You cannot repeat anything. A. All right, then. Well, then, my husband called the hospital, tried to find out under what circumstances she went there.

Mr. Wilder: I pray your Honor's judgment.

The Witness: And they could not—

The Court: This is in your presence?

The Witness: Oh, yes.

* * * *

(21) The Court: All right, you may testify.

The Witness: And they could could give him any information until Monday, when the doctor, I think the admitting doctor, the one whose name is on that notice, would be in, and then he would find out more fully. That was the information given him over the telephone. This was on Sunday, the 26th of February, 1955.

Q. Now, on the next day, February 27th, did you receive a call from Dora Aberlin, the sister of the plaintiff, Isadore Aberlin, and who appears now as co-counsel, did you receive a call from her? A. Yes, I did.

Q. What was that conversation? A. It was about—

Mr. Wilder: I pray your Honor's judgment.

The Court: I will allow it.

Q. You tell us.

The Court: This is a family disturbance. I am going to try it wide open. You may answer.

The Witness: It was about 8 in the evening of the 27th. It was on a Sunday. Dora Aberlin called me. The first thing she said was, we are having a picnic here.

* * *

(22) A. You were going to talk with the doctor and find out what the situation was at the hospital and that you would be happy to have Gail come and stay with us. Later on you repeated to me the things that she said on the other end.

(23) Q. What was that?

Mr. Wilder: I pray your Honor's judgment, what the parties talked over as husband and wife.

The Court: What she heard, herself, she may testify to.

Mr. Zisman: Very well, your Honor.

The Court: Anything you heard, yourself, you can testify to. You cannot testify to what someone told you, someone else said.

Q. Now, subsequently, on February 28th, whether or not I called the Bellevue Hospital and spoke to Doctor Victor J. Teichner in your presence? A. Yes.

Q. And do you recall what I said to him? A. Yes.

Q. What did I say? A. That you would try to be in New York and see him and see what could be done for Selma.

Q. And to your knowledge in the interim whether or not I had seen your late father? A. That is right, because I accompanied you to—

Q. Do you recall that your late father requested me to go to New York to do what I could?

Mr. Wilder: I object.

The Court: Tell us what you heard.

(24) Q. What did your late father say?

Mr. Wilder: I pray your Honor's judgment.

The Court: I will allow it. I said, this is a family disturbance, I am going to try it wide open, get the true picture here, if we can.

Q. What did your late father say to me in your presence? A. You told him, you showed him the notice and he said, what can you do about this, and you told him you were going to telephone this Doctor Teichner Monday and find out. He said, see what you can do to help her.

Q. Do you recall that on the same evening, February 28th, I called Dora Aberlin from our home? A. That is right, yes.

Q. You remember the conversation that you heard me have with her? A. Yes.

Mr. Wilder: I pray your Honor's judgment again, unless the witness can testify as a fact that Mr. Zisman talked to Dora (25) Aberlin, I am going to object.

The Court: She has already testified she did talk to him. Now the question is, what did this witness hear the plaintiff say? I will allow it.

Q. What did you hear me say to Dora Aberlin? A. I cannot remember everything.

Q. Just what you remember, that is all. A. Well, that you had spoken to this doctor and that if my sister, you know, was there under a temporary situation, and that she was running a temperature, when she went in I think.

Q. Well, to simplify it, to simplify the matter, whether or not I said while in New York, I will arrange to see you? A. That is right, yes.

• • •

(26) Q. But you remember a call after I brought Selma back to Boston? A. Yes.

Q. And you recall the conversation that I had with her, not what she said to me, but what I said to her? A. Yes.

Q. What was that?

Mr. Wilder: I pray your Honor's judgment again.

The Court: What is the question?

Mr. Zisman: The question is, what conversation I had with Miss Meredith.

The Court: I will allow it, something she heard.

Q. That you heard, the talk I had, to the best of your knowledge. (27) A. The 8th of March, did you say?

• • •

A. Well, every time I went to visit her she inquired, was Gail with me? I said no. She wanted to know why she was not. She said the arrangement was she was to come to me on a certain date and I could not give her any answer, I did not want to upset her.

Mr. Wilder: I am going to have to object to this, this is a conversation with a woman admitted as insane in a mental hospital.

(28) The Witness: She was not insane, pardon me, your Honor.

The Court: I will allow the question and the answer.

Q. Tell us what she had to say to you about Gail?

* * *

(29) Mrs. Aberlin: You didn't serve me with a notice to produce.

Mr. Wilder: Just a minute, Mrs. Aberlin.

Mr. Zisman: Let me show you this copy; read it over; see if you remember that you typed that letter.

Mr. Wilder: I object to any self-serving letters sent by the defendant in this action.

The Court: I do not know that they are self-serving. When was the letter sent?

Mr. Wilder: This is dated March 10th, 1955.

The Court: It is hardly self-serving. I will allow it.

Mr. Wilder: Who was this to?

Mr. Zisman: Dora Aberlin, Esq.

Mr. Wilder: Not to the father?

Mr. Zisman: No, not to the father.

The Court: That is Defendants' Exhibit B.

Mr. Wilder: May I see it, please?

Mr. Zisman: Oh, surely. I thought you had.

(Copy of letter to Dora Aberlin, Esq., dated March 10, 1955, marked Defendants' Exhibit B in evidence and read to the jury by Mr. Zisman.)

Mr. Zisman: I am going to introduce this one. This, may it please the Court, is also a letter directed to Dora Aberlin, Esq., dated March 14th.

The Court: That is Defendants' Exhibit C.

(32) A. Well, when I met—let me start from the time I met you at the station and the reason for our going to Doctor Kudisch's office. When I met you at the station, Gail had a rash on her face. She told me she also had a rash on her body. I said, Well, I have two children, I want to be sure everybody's welfare is taken care of. I said, You must come to the doctor and have him examine you. That was the reason for the trip to Doctor Kudisch's office. He examined her and said it was—

Mr. Wilder: I pray your Honor's judgment.

The Court: I will allow it; I want the whole picture.

Mr. Wilder: As to what Doctor Kudisch testified to?

The Court: That is right, yes.

The Witness: And Doctor Kudisch said it was because of nerves and possibly an allergy. He prescribed a medicine. Also he weighed Gail and found her to be underweight.

* * *

(41) LENORE ZISMAN—Cross.

Q. Don't you know whether or not—or did you know where he lived? A. No, I did not.

Q. Did you at any time make inquiry as to where he lived? A. I wasn't interested.

Q. Were you interested in the fact as to how he lived? A. I never concerned myself with that.

Q. Were you concerning yourself as to how the child lived? A. I was concerned about Gail, yes.

Q. Did you know where the child lived with him? A. I didn't know she did live with him.

Lenore A. Zisman—Cross.

Q. Did you sign the petition alleging that the child lived with him? A. The wordage might have something to that effect.

Q. Did you read this petition before you signed it? A. I did. I cannot remember the words verbatim, if you ask me now.

Q. So much of the petition that says, said minor child is (42) temporarily residing with her father, but is not being properly care for; did you sign that petition? A. I did.

Q. What did you mean by stating you didn't know where the child lived? A. I did not know the exact address.

* * *

(43) Q. Did you make any calls to the home of the child's father? A. I never did.

Q. Did you at any time inform the child's father that you intended to ask for custody? A. No, I did not.

* * *

(44) Q. Prior to April 1st, 1955, when was the last time you met him? A. What was that date, again?

Q. April 1st, 1955, the date of the alleged kidnapping. A. I would say roughly around 1949.

Q. In the preceding six years did you, of your own knowledge, have any personal knowledge as to how the father was living? A. By that you mean—

Mr. Zisman: Pardon me, I am going to object to this. I think we are going extremely far afield.

The Court: I will allow this one question; go ahead.

Mr. Zisman: All right.

Q. Did you have any personal knowledge, for the six years preceding the time of your signing this petition, as

Dorothy Gail Aberlin—By the Court.

to how the father lived? A. Well, only what my sister told me. I had never been to New York, to any place they lived or he lived.

Q. Yet, on the strength of what your sister told you, you signed a petition asking for temporary care?

Mr. Zisman: I object to that.

The Witness: The main information—

(45) Mr. Zisman: Just a moment.

The Court: You are getting far afield. I am not going to upset any Probate Court decree. Let's proceed with the alleged kidnapping and conspiracy to kidnap.

* * *

---

(54) DOROTHY GAIL ABERLIN—Examination by The Court

Q. Gail, let me ask you a few questions. If you do not know the answers, you just say so. Lots of times I do not know the answers. The day that Miss Meredith and your uncle met you at the school, were you surprised? A. Yes.

Q. What was said to you? A. Well, at the school, Jim was at one entrance and Miss (55) Meredith—

The Court: Stand closer to the microphone.

The Witness: Jim was at one entrance and Miss Meredith was at the other, and Jim said to me, "Do you want to come out to Stoughton with your aunt Leonore and I?" I said, "Yes, but I cannot."

The Court: "Yes, but I cannot." And then what was said?

The Witness: Jim—

Q. Uncle Jim? A. Yes.

Q. What did he say then? A. I don't remember.
Q. Did they promise you anything? A. Who?
Q. Did they grab you and make you come? A. No.
Q. You were willing to go? A. Yes.
Q. Why were you willing to go, can you think of any reason? A. When I was in their house—
Q. If you want to rest a little while? A. All right.
Q. Go ahead and tell us about it; tell us in your own words, why were you willing to go with them?

* * *

---

(68) SELMA ABERLIN—Cross.

Mr. Zisman: Just a moment.
Mr. Wilder: Could I read to you?

A. You are trying to bring up, about my original divorce?
Q. Yes or No? A. I refuse to answer that question.

Mr. Zisman: Please.
The Court: I will sustain the objection.

Q. Do you recall at any time ever admitting to the fact that you gave false testimony?

Mr. Zisman: Just a moment.
The Witness: I refuse to answer that.
The Court: I will sustain that objection.

* * *

(71) Q. I show you this note here, Mrs. Aberlin, together with a letter dated August 16th, 1954. I ask you whether that is—

Mr. Zisman: I am going to object to that.

The Court: I will overrule the objection at least until the question is asked.

The Witness: For heaven's sake, put that away, please.

Q. I will ask you whether or not that is your signature? A. My full signature has a first and last name. That is my first name.

Q. I will ask you whether or not you signed that note, Selma?

The Court: That is simple.

The Witness: Yes, you have asked me that before.

• • •

(73) The Court: I will allow it.

(Letter, July 13, 1954, marked Plaintiff's Exhibit No. 7 in evidence and read to the jury by Mr. Wilder.)

• • •

Q. I show you this letter and ask whether that is your signature? A. Did I ever show you this?

Mr. Wilder: Mrs. Aberlin, please.

The Witness: Well—

Q. I will show you that and ask you if that is your signature? A. That is my signature.

• • •

(74) The Court: I will explain that to the jury when we get to that point. I will allow the letter in.

Mr. Zisman: Very well.

(Letter, August 27, 1954, to whom it may concern, marked Plaintiff's Exhibit 8 in evidence and read to the jury by Mr. Wilder.)

* * *

(75) Q. I show you this letter, Mrs. Aberlin. A. You showed me that letter before, Mr. Wilder. Whether it is my first name or my middle name or my last name, I do not know. It is mine. I wrote it, yes. You have asked me that before. Don't take up the Court's time.

Q. Will you agree you wrote all these letters?

The Court: Come, speed it up; do something.

* * *

(76) The Witness: Yes, I wrote them all, go on with this, please.

The Court: Put them all in, counsel stipulates.

(Letters marked Plaintiff's Exhibits 9, 10, 11 and 12, in evidence.)

Q. Now, from September to April 1st, 1955, you resided in New (77) York, did you not? A. In September, 1955, correct.

Q. From September, 1954? A. Yes.

Q. Till approximately? A. February 22d.

Q. The 1st of March? A. No. February 22d, I went into Bellevue myself.

Q. You voluntarily went to Bellevue? A. That is right.

Q. That was because of a pending nervous breakdown? A. I was very sick.

Q. Prior to your going to Bellevue, did you not take your daughter and deliver her to the home where your husband was then living? A. I did not.

Q. Then what did you do with your daughter? A. I called Mr. Aberlin and asked him if he would take the child to dinner, I was sick. When I got out of bed I had a headache. I had a high temperature. I could not cook, food nauseated me. I was very sick.

* * *

(78) Q. Well, how long after Mr. Aberlin took your daughter did you go to Bellevue? A. Well, I don't remember the exact date. I have the pills here, the prescription the doctor gave me. It is marked February 15th.

* * *

---

(83) ISADORE ABERLIN, Sworn.

Direct Examination by Mr. Wilder:

Q. Will you please state your name? A. Isadore Aberlin.

Q. Where do you live, Mr. Aberlin? A. 165 West 20th Street, New York 11, New York.

Q. How old are you, sir? A. 47.

Q. And what is your occupation? A. I am a chart technician in Wall Street.

Q. By whom are you employed? A. By several brokerage firms.

Q. Are you a member of the New York bar? A. I am, since 1934.

Q. Are you a member of the Federal bar of the State of New York? A. I think I applied for admission once. I cannot recall it, it is since, before the war.

Q. You are the former husband of the previous witness, Selma (84) Aberlin? A. I am.

* * *

Q. In February of 1955, where did you reside? A. 165 West 20th Street, the same address.

Q. How long had you been residing there? A. Since January, 1952.

* * *

Q. And some time during the month of February, 1955, did you secure physical custody of your daughter Gail?

Mr. Zisman: I object to that question.

The Court: I will allow it.

A. I not only secured physical custody—

Q. Yes or No. A. On two occasions I secured custody, two separate occasions.

(85) Q. Will you give us the first one of them, please. About when was it? A. About February 10th or 12th or 13th.

Q. What were the circumstances surrounding that? A. Mrs. Aberlin was very ill. She had a respiratory infection. She called on me to see if I could do something to take care of Gail.

I saw here, where she was living. She was rather discouraged and upset. She had laryngitis, probably a temperature. I told her I would send her to the hospital. I told Mrs. Aberlin I would send her to the hospital, to take care of her. She was the mother of my child, after all.

Q. Where was this conversation? A. In the hotel Benjamin Franklin, where she was then residing. Gail was there at the time. She was not willing to do that, she asked me if I would take Gail for a few days. She bundled up Gail's clothes. Around 5; 5:30, I took Gail with me. Gail stayed with me 48, 72 hours. She got a little bit better. She came down and demanded her.

Q. When did she come down? A. About 3 or 4 days later, when she felt a little better.

Q. Where did she come to make the demand? A. The apartment that I was living in, West 20th Street. She was given the child. Three or four days later I got an excited phone call from a social worker who asked to see me. She said (86) my ex-wife had been in here to see her, she had 15 cents in her bag, she did not know what to do. I was amazed. I had given her $100, a week, ten days before.

She didn't know what to do. I told her I didn't want to press anything, she could do as she saw fit herself. The social worker saw the handwriting on the wall and advised her the best place to go would be the Bellevue Hospital.

I had nothing to do with the matter. She signed herself into Bellevue Hospital. The night before she did the same, at about 9:30 in the evening of either February 21st or 22d, she appeared at my home with Gail, with all her clothes, and left her there and then went to the hospital by herself.

(87) A. Gail resided with me continuously from that time until the (88) afternoon of April 1st when she was missing from school in the afternoon and also missing from day camp.

The Court: After Gail came to live with you, what was your relationship?

Q. How often did you see her? A. Every day. I took her to school every morning in the car. I wanted, she was going to school at 77th Street where her mother had registered in September. I did not desire to take her out of school in the middle of the term, although I did toy with the idea of possibly putting her in a private school closer to home. They would not take her in the middle of the term, The Little Red Schoolhouse, an elaborate and

well considered school in the neighborhood. She knew she had to travel.

• • •

The Witness: I gave her her breakfast every morning.

Q. Did you cook her breakfast? A. I did. There was no one else there to do it. I stayed (89) there, took her to school, gave her her breakfast.

Q. Who was living in your home at that time? A. My sister Gertrude, my brother, part of the time.

Q. Is this your sister Gertrude here? A. She's in the court room now. She is a public school teacher.

Q. She teaches in the public schools in New York City? A. The City of New York. She leaves early in the morning and could not possibly give the child her breakfast

• • •

(93) Q. Now will you tell the Court and jury, Mr. Aberlin, just what happened on April 1st, as you recall it? A. On April 1st, about 8 or 8:10, she's picked up by the camp car and taken to school. I usually give her enough money for her lunch at the school. Of course, I'm off to work. About 4:30 or 5 o'clock that afternoon, at work, I got a telephone call from the Camp Director, asking me where my child was, that she had not shown up at camp. I couldn't possibly account for it. I tried to contact the school, and I couldn't find anything out. I contacted my home. She hadn't been home. She wasn't recorded sick. I got a little bit upset. I called the Missing (94) Persons Bureau. No report of anything there. I waited a while and got in contact with my sister Gertrude, who by that time had arrived home, had her call Miss Meredith, who is supposed to be a friend of Mrs. Aberlin's family. She got no answer—couldn't contact her.

About 7 o'clock that night a telegram was delivered to my home, and I received it some time later.

Q. Is this (handing) the telegram that you received? A. This is the telegram that I received. It's stamped 4:28 p. m., which is probably the time of delivery at the telegraph office. I received it about 7 o'clock. So, from late that afternoon until I received this telegram, I had absolutely no knowledge or information whatsoever as to where my child was, and as a natural parent I was quite concerned, and the furthest thing from my mind that she had ever been taken to Boston. I had no notice, no phone call, no mail.

* * *

Q. Did you at any time ever consent to Mr. Zisman taking custody of your child?

Mr. Zisman: I object to that question.
The Court: I sustain the objection.

Q. Did you at any time have any conversation with Mr. Zisman (95) relative to your child? A. I had practically no conversation with Zisman about my child, except a phone call that he made to me, and I denied that I would ever give him custody of my child. I wouldn't even consider it. I was the natural parent—

* * *

A. Mr. Zisman asked me over the phone whether I would entertain sending my child to his family in Boston, and I said, "Absolutely no."

Q. Did you have any particular reason for that?

The Court: No.
Mr. Zisman: I object.
The Court: I sustain your objection.

James Zisman—Direct.

Q. Did you at any time receive any notice from any court as to any pending custody proceedings? A. I did not—

* * * *

(96) A. I did not receive any notice whatsoever, at any time.

* * * *

(116) Miss Dora Aberlin: As my brother's attorney, am I not privileged?

The Court: Pardon me?

Miss Aberlin: As his attorney in New York?

The Court: No, not unless you are going to argue the case. Are you going to argue the case?

Miss Aberlin: No, I am not going to argue the case, but I am his counsel in New York.

The Court: That privilege is not extended so far. There is no question of privilege here.

Mr. Zisman: I call Dora Aberlin.

* * * *

---

(132) JAMES ZISMAN—Direct

Well, Gail said that she hadn't spoken to Miss Meredith, or, rather, hadn't seen her since March 8th.

Mr. Wilder: I pray your Honor's judgment.

The Court: I'll allow it. Go ahead.

Mr. Wilder: Conversation with Gail?

The Court: Go ahead.

* * * *

(133) Cross Examination by Mr. Wilder:

Q. Mr. Zisman, you had this letter in your pocket when you went to New York? A. That's right.

Q. Plaintiff's Exhibit 3. Why didn't you mail it in Boston? A. I had no reason to mail it in Boston.

Q. Why did you not mail it in Boston? A. Well, I thought the telegram would be sufficient notice as to what had happened; and I thought of sending this letter to give a (134) very full explanation of what had transpired and the reasons for it.

Q. Mr. Zisman, why didn't you send the telegram from Boston? A. There was no occasion for my sending it from Boston. I—the reason—Strike that out.

* * *

Q. Mr. Zisman, may I ask you again? Why didn't you mail the telegram and the letter from Boston? A. Well. I thought I ought to do the right thing, to notify the father so he wouldn't be disturbed about it. I got no response from them at all.

Q. Why didn't you mail the telegram the day before when you knew you were coming to New York? A. Well, under the circumstances, where these people had been cooperative—uncooperative, and where Selma was so disturbed, I thought some affirmative action had to be taken.

Q. You mean to tell this jury that the father was uncooperative because he wouldn't give you his child? A. No, I don't mean that at all. He didn't even give me the courtesy of getting in touch with me. I don't mean that at all. He didn't give me his child at all.

(135) Q. He gave it to your wife? A. He did not give the child to my wife. He could have, as a gentleman, but he didn't.

Q. As a gentleman, you want this Court and jury to believe that he should have turned his flesh and blood over

to your wife? A. Oh, I didn't say that at all. He should have carried out his original agreement of March 5th, to do something that would be best for the child, and if he had a sense of moral duty he would have done it and not have all these wrangles.

Q. As a sense of moral duty, to give up his own child? A. I didn't say anything about giving up his own child. You ask me why, and I'll go further and say, if he feels that Selma is an incompetent person he has a very simple remedy: to go into our Probate Court and ask for modification of that decree.

Q. We're talking back— A. You asked me why.

Q. We're talking back to April 1st, 1955. A. You asked me why.

Q. Did you at any time tell the plaintiff here that you were going to ask for temporary custody? A. No, I never did.

Q. Did you send him any notice the day you went to the Probate Court and asked for temporary custody? A. I was asked that question yesterday, your Honor, and I testified that I hadn't.

Q. And the first notice he got was when you mailed this letter (136) you had in your pocket all the time? A. I had it with me that day, yes.

Q. And you didn't mail it in Boston? A. I testified that I didn't.

Q. And you knew if he knew you were coming to New York, he would prevent you from taking the child? A. Oh, I don't know what was in his mind at all. I had a few ideas which I am not permitted to disclose.

Q. Isn't that the reason that you didn't mail the letter, because you knew he would have you arrested or prevented from—

* * *

Charge to the Jury.

(137) SWEENEY, Ch.J. Now, members of the jury you are about to pass on two questions in this case, and one is, whether or not these two defendants, Mr. and Mrs. Zisman, conspired to kidnap Gail. That is the first question. I will define conspiracy in a few moments. And the second question is, Did they actually kidnap her? And then, of course, if you find both of these things happened, there will be the question of damages, which I will refer to in just a moment—or, rather, a little later.

Now, this is a civil action, and it is brought by the father of Gail for damages resulting to him, as he claims, by reason of the conspiracy and the actual kidnapping of Gail.

(138) What you have to do is, in retrospect, to set your minds back to the period covered by Gail's residence with the Zismans, which is from April 1st, I think—you decide the facts, I won't—April 1st to some time in October; and find out, if you answer the question that she was kidnapped, there was a conspiracy to kidnap, how much damage the father suffered.

I'm very frank to say to you that under Massachusetts law, if we were applying the law of Massachusetts alone, there could be no recovery for so-called abduction or kidnapping of the child; but we are governed in most respects by the laws of the State of New York, where the alleged kidnapping took place. The strongest case we could find in point from the legal angle is where parents who had a legal right to the custody of a grandchild—this case happens to be where the child was taken away—the courts of New York held there was a right of action.

Now I say legal custody advisedly, because in this case, the case we are now trying, the legal custody, if I understood the evidence correctly, was in the mother; that there had been a divorce and by stipulation or otherwise the mother, Selma, was granted custody of the child, and, under the laws of the State of New York, had that child

been taken from her custody illegally, under the case I referred to, she would have a right of action.

Before I refer to several definitions of what kidnapping and conspiracy are, I want to call to your attention that in this, like any other civil case, the burden is on the plaintiff, (139) Mr. Aberlin, to prove by the greater weight of the evidence that what he alleges is true; in other words, that these two defendants did conspire to kidnap and actually did kidnap; and if he has not satisfied you that the greater weight of the evidence is on his side, then of course there can be no recovery, because he is bound by the law to prove by the greater weight of the evidence that what he alleges is true.

Now, along the walls you see these metal plaques with the scales of justice in them. They are very similar to the old pharmaceutical scales. If you could take all the plaintiff's evidence and put it in one pan, and all the defendants' evidence and put it in the other pan, if they still maintained equilibrium, then there could be no greater weight, don't you see—then his case would not be established by the greater weight; but if the scales tip ever so lightly either way, then there lies the greater weight.

The burden is on the plaintiff, not to raise a suspicion in your minds, but to prove to you by the greater weight of the evidence that what he alleges actually transpired.

A conspiracy is a distinct and separate act. In the Federal Court it means that two people agree to do an illegal thing, or they agree to do a legal thing in an illegal manner. A simple agreement is not enough; there must be some overt act, some forward step taken in pursuance to that agreement before it constitutes a conspiracy, either criminally or civilly.

(140) That is one of the bases of the complaint here. They say that Mr. and Mrs. Zisman conspired to do an illegal thing—to kidnap. It is up to you to say from the

evidence whether you are satisfied by the greater weight of the evidence that that existed, or do we have a family squabble here?

So much for conspiracy. It means the agreement to do an illegal thing, and some step in pursuance of it.

What is kidnapping? Strangely enough, in going to the dictionary we find the original definition of kidnapping was the spiriting away of Englishmen to serve in the colonies in the United States. That is farfetched from the Lindbergh kidnapping, but that was the original meaning of it. What it means now, today, in our ordinary walks of life, is diverting someone's person from ordinary pursuits, either by force or by fraud.

If I were to take a gun and hold it against your head and say, "You come with me," that's force. If I were to say to you, "Your husband, or your wife, has just been hit by an automobile up on Tremont Street, come with me," and you were diverted, that's fraud.

The person who is generally injured is the person who is kidnapped. He was diverted from his normal pursuits and in a strange channel by either force or fraud.

But, under the law, another person can be injured, and that is the person who has the legal right to the custody and control of the person who was kidnapped. There has been some (141) evidence here, or some intimation, that the mother relinquished the child to the father. There were several letters written in 1954 that might show an intent on her part to let the father have the child—physical custody. In one instance she said, "I guess I'll always regret this decision but there's nothing else to do"—something to that effect.

But bear in mind that all during this time she had the legal right to the custody of the child, and, while she could have relinquished the child to the father, or could have intended to relinquish the child to the father at some

later time, she always had the right, the legal right, to the custody of that child, and could have changed her mind any time she wanted to.

Now kidnapping—to be legally such—must be accompanied by force or fraud. If you find in this case there was neither force nor fraud, then there was no kidnapping, and your answer to both questions must be, No.

You have to project your minds back to that period of time and examine the relationships between all of the parties concerned. You heard me say several times during the trial of this case, when either side may have objected, that I was going to try the case wide open. By that I meant, I was going to liberalize as far as I could legally the laws of evidence so that you might better understand the actual situation here.

How did the parties feel at or about the time that Gail was separated from her parents? Now it isn't enough to sit back and simply tell somebody, "I was horribly hurt, I was very un- (142) happy." That is good evidence, of course, But the best evidence, the best method of getting at the truth of any situation, is to examine the credence, the believability of the evidence, the oral evidence, in the light of certain, well what I call monuments—certain established things that happend, that nobody controverts. There was a telegram sent here. Nobody doubts that. All agree to it. In the light of that monument, that direction sign, or sign post, and any other non-controverted facts, test the credibility of the oral evidence that you hear in the light of those well-established monuments.

Now, if you find that there was a conspiracy to kidnap and an actual kidnapping here, how are you going to translate that into dollars and cents?—because that is what the plaintiff is asking for. He is asking for money damages by reason of his hurt feelings, his hurt pride, etc. Well, if there was such a thing existing, then you have to trans-

late it into dollars and cents. Difficult as it may be, there is no reason to believe that—I was going to say twelve, but there are only eleven of you—any other jurors can do it any better than you can. But that is only if you decide that the plaintiff has really been injured by reason of what the defendants did.

Now, the defendant urges upon you implicitly, I think, that he had nothing to gain from taking this child, that he was interested in the child's welfare, and he believed the child was not being taken care of properly. He got that information (143) third-handed. But, nevertheless, he is now charged with diverting that child's normal life by force or fraud.

I am going to ask you now to retire; and I am going to ask you to answer these two questions:

"Did the defendants, James and Leonore Zisman, conspire to kidnap Doroth Gail Zisman?"

You are advised that a conspiracy is an agreement, specific or implied, to do an illegal act? Did they conspire to kidnap this child?

And, second, did they actually kidnap the child?

If you find that either of those questions should be answered, Yes, then you turn to the other sheet and assess the damages, to the extent that the plaintiff has, you find, been damaged by reason of any illegal act.

Now I will see counsel for suggestions of errors or omissions.

(Conference at the bench, at which the following is recorded):

"Mr. Wilder. I ask the Court to instruct this jury, your Honor, that if the mother became confined, the domicile of the child ought to be with the father.

The Court: No, I will not give that instruction.

Further Charge to Jury.

Mr. Wilder. Note my exception to your Honor's refusal.
(144) The Court: No exceptions in this court. I'll note your objection.

Mr. Wilder: I would like the Court to instruct the jury that the child was domiciled in New York at the time of the alleged kidnapping.

The Court: No, they will find that for themselves.

Mr. Wilder: I would like the Court to instruct the jury as to the force of the Probate Court order outside this commonwealth.

The Court: No.

* * *

(The jury retired from the court room at 12:18 p.m.)

(Counsel confer with the Court at the bench.)

The Court: I will have to bring the jury back, and I will charge them later.

(The jury return to the court room at 12:20 p.m.)

The Court: Sometimes counsel submit these cases without argument to the jury, and I assumed that is what they
(145) were doing here; but counsel now assert they want to argue the case, and until I revive your memories just forget everything I said to you in my charge. We will now hear counsel argue, and I will give them each 15 minutes apiece—no more.

* * *

(151) FURTHER CHARGE TO THE JURY

SWEENEY, Ch. J. I don't intend to add much to what I said to you, but some reference has been made to the fact that the father had custody of this child. I say to you as a matter of law that, from the moment the probate decree was signed giving custody to the mother, she alone had the legal right to the custody of the child until that decree

was vacated, which did not take place until some time in September.

I will also call to your attention, that some reference has been made to the fact that Mr. Zisman did not go to a court in New York for an agency, or something of that nature. If he had any rights in the matter, he wasn't bound to go to those places.

Now again I will refer to the definition of conspiracy (152) as an agreement to do an illegal act. Secondly, I have adverted to kidnapping as a diverting of a person's normal method of living by reason of force or fraud. If you don't find that, then there must be a verdict for the defendants.

* * *

The Court: (After inspecting.) You have answered both questions in the negative. The judgment will therefore be entered for the defendants.

Thank you very much. I think your verdict is a very just one. Next Monday, at 10 o'clock.

* * *

Extracts From Deposition of Alice M. Amero.

(6) ALICE M. AMERO, having been duly sworn, testified as follows in answer to direct interrogatories by Mr. Wilder:

Q. Please state your full name. A. Alice M. Amero.

Q. Where do you live, please? A. 80 Middle Street, Gloucester, Massachusetts.

Q. And by whom are you employed? A. Department of Mental Health, Commonwealth of Massachusetts.

Q. What is your official position? A. Senior Statistical.

Extracts From Deposition of Alice M. Amero.

Q. And in answer to a notice sent to your office, have you appeared here today with certain records? A. Yes, sir.

Q. May I see them, please? A. Yes, sir (handing documents to Mr. Wilder).

• • •

(7) Mr. Wilder: I beg your pardon, Mr. Zisman (handing documents to Mr. Zisman).

Mr. Zisman: This is a copy of the original?

The Witness: Yes, sir.

Mr. Zisman: I have no objection to that.

Q. I show you a document. (Handing document to witness.) Will you please identify that? A. The legal name for it, you mean?

Q. Yes. A. Temporary Care Paper, under Section 79, Commonwealth of Massachusetts.

Q. And that is known as your Form number what? A. Form No. 5.

Q. Will you read this from the very top, starting right at the top, right into the record? A. Temporary Care. The Commonwealth of Massachusetts. To the Superintendent of the Boston State Hospital.

I hereby request you to receive into a before-named hospital for a period not exceeding ten days Selma Aberfin, who in my opinion is in need of medical care and treatment because of mental derangement other than drunkenness. The following statement relative to the patient is submitted under the provisions of Section 79, Chapter 123, General Laws.

• • •

(8) 2. Number of present attacks. —Constant, present attack began December 7, 1947.

Extracts From Deposition of Alice M. Amero.

If the patient has ever been an inmate of an institution for the insane, state when, where and for what length of time, and whether discharged, or recovered, or otherwise. February 22, 1955, Bellevue Hospital, New York to March 5, 1955; released to the family for (9) return to Boston, Massachusetts.

3. Was the present attack gradual or sudden in the onset? A. Constant.

• • •

(12) The Commonwealth of Massachusetts. Suffolk, ss.

To the Honorable, Judge of the Probate Court, in Boston, in the County of Suffolk.

The subscriber, Martin J. Conroy, of Boston, in the County of Suffolk, respectfully represents that Selma Aberlin, residing in Boston, in the County of Suffolk, is a proper subject for treatment and custody in a hospital for the insane; and therefore prays that said Selma Aberlin may be committed to the Boston State Hospital, and as required by Section 54 of Chapter 123 of the General Laws, makes the following statement relative to the patient.

• • •

(15) Subscribed and sworn to before me, this 10th day of March, 1955, John J. Mahoney, Judge of the Probate Court.

(16) Page 2. No. 40. Mention this number when requesting blanks.

Copy:

Medical Certificate of Insanity.

Extracts From Deposition of Alice M. Amero.

The Commonwealth of Massachusetts.
County of Suffolk. City of Boston.

We, Oscar J. Raeder, a permanent resident of Dedham, County of Norfolk, and the Commonwealth of Massachusetts, and

Hazel C. Kanz-Powers, a permanent resident of Boston, County of Suffolk and Commonwealth aforesaid, being severally and duly sworn, do make oath and depose, each for himself, with the exceptions hereinafter noted, as follows:

1. That I am a graduate of a legally chartered medical school or college; that I have been in the full practice of medicine for three years since said graduation, and next preceding the making of said oath.

That I am registered in accordance with the provisions of Chapter 112 of the General Laws; and that I do not hold any office or appointment, other than that of Consulting (17) or Advisory Physician, in or connected with the hospital for the insane to which this commitment is to be made.

2. That within five days prior to my signing and making oath to this certificate, namely, on the 8th day of March, A. D. 1955, I, the subscriber, personally examined with care and diligence Selma Aberlin, a resident of Boston, County of Suffolk, and the Commonwealth of Massachusetts, and as the result of such examination find, and hereby certify, that in my opinion she is insane and a proper subject for treatment and custody in a hospital for the insane, as an insane person, under the provisions of the law.

3. That I have formed the above opinion from paragraph A. Facts indicating insanity, observed by me

Extracts From Deposition of Alice M. Amero.

(her record, what the patient said, and by her appearance and behavior).

A 36-year old divorced white woman who is at present in a maniac state. She is over-talkative and has been depressed.

(Back of Form 40.)

(18) B. Other facts, including insanity, including those communicated to me by others.

State whether there has been any change in the patient's mental condition, and bodily health, and if so, what.

Answer. Boston State Hospital under Section 79, since 3/5/55.

She needs care in a mental hospital. She is said to have had constant attacks since December, 1947. She was at Bellevue Hospital, New York from 2/22/55 to 3/5/55, and was released to return to Boston.

4. That the above statements are true, to the best of my knowledge, information and belief.

Oscar J. Raeder, M. D.
Hazel C. Kanz-Powers, M. D.

Subscribed and sworn to before me this 10th day of March, 1955.

John J. Mahoney, Probate Court, a true copy, attest.

John J. Mahoney, Judge, Probate Court.

(Form 23.) Copy.

Plaintiff's Request That the Court Instruct the Jury on the Law as Set Forth in the Following Requests.

Now comes the plaintiff in the above entitled matter and requests the Court to instruct the Jury on the law as follows:

1. That upon all the evidence the Jury is warranted in finding for the plaintiff.
2. That by the weight of the evidence the Jury is warranted in finding for the plaintiff.
3. That the Jury is to be governed by the laws of the State of New York.
4. That the defendant, James Zisman, conspired to kidnap plaintiff's minor daughter, Gail Aberlin, within the State of New York.
5. That the plaintiff is a resident of the State of New York.
6. That at the time of the alleged tort, the plaintiff had physical custody of his minor daughter Gail Aberlin.
7. That at the time the plaintiff's former wife, Selma Aberlin, was committed to Bellevue Hospital, New York, New York, custody of the plaintiff's minor daughter reverted to the plaintiff.

   King, et al. v. Kings, 277 N.Y.S. 653, 243; App. Div. 780.

8. That at the time the plaintiff's former wife, Selma Aberlin, was a patient committed to the Mattapan State Hospital, Boston, Mass., plaintiff had custody of his minor daughter.
9. That at the time the plaintiff's minor daughter was removed by the defendant, James Zisman, from the

Plaintiff's Request That the Court Instruct the Jury on the Law as Set Forth in the Following Requests.

State of New York she was a resident and domiciled in New York.

10. That as a matter of law, the plaintiff's minor daughter at the time she was removed by the defendant, James Zisman, from the State of New York had a domicile, the same being that of her father Isadore Aberlin.

11. That the alleged temporary order awarding custody of the plaintiff's minor daughter to the defendant, Lenora Zisman, was a violation of due process of law.

12. That the plaintiff at no time prior to the time his daughter was removed from the State of New York by the defendant James Zisman was given notice of the so-called temporary order.

13. That the order of the Suffolk County Probate Court awarding temporary custody to the defendant, Lenore Zisman, did not authorize the involuntary removal of the plaintiff's minor daughter from within the State of New York.

14. That the defendant, James Zisman, removed the plaintiff's minor daughter from the State of New York in violation of the law.

15. That the defendant, James Zisman, in order to enforce the order awarding Lenore Zisman temporary custody of the plaintiff's minor daughter was required to secure an order of a Court of competent jurisdiction within the State of New York.

16. That the defendant, James Zisman, at no time prior to the removal of the plaintiff's minor daughter from the State of New York secured an order from

Plaintiff's Request That the Court Instruct the Jury on the Law as Set Forth in the Following Requests.

a Court of competent jurisdiction within the State of New York.

17. That a decree of a Probate Court of the Commonwealth of Massachusetts may not be exercised in a foreign State without a supplementary decree of said foreign State.

18. That as a matter of law the plaintiff is entitled to damages for the loss of the society, comfort and services of his minor daughter. Secondly, for his personal distress, anguish of mind and humilation.

19. That the Constitution of the United States guarantees that no one shall be deprived of life, liberty or any rights without due process of law which entails.

A. Notice.

B. Opportunity to defend.

20. Zisman took the plaintiff's daughter without giving the plaintiff either notice or the opportunity to defend.

By his Attorney,
RICHARD L. WILDER.

Plaintiff's Exhibit 1.

PETITION AND ORDER, ANNEXED TO FOREGOING AFFIDAVIT.

TO THE HONORABLE THE JUDGES OF THE PROBATE COURT AND FOR THE COUNTY OF SUFFOLK:

RESPECTFULLY represents, Lenore A. Zisman of Stoughton, County of Norfolk, that there is occasion to give her temporary custody of a minor child who is now living and whose name and date of birth is as follows: Dorothy Gail Aberlin, born February 8, 1945, the daughter of Isadore J. Aberlin of New York City, State of New York and Selma D. Aberlin of Boston, County of Suffolk, divorced (see Suffolk Probate No. 51148).

That by decree of said Court entered May 15, 1953, the said Selma D. Aberlin, libellant, was given custody of said minor child and the libellee ordered to pay to the libellant the sum of $25 weekly for the support of said minor child.

That said minor child is temporarily residing with her father but is not being properly cared for.

That the said Selma D. Aberlin, mother of said minor child is temporarily ill and unable to care for her. That the said Isadore J. Aberlin agreed to send said minor child to the home of your petitioner during the illness of the child's mother, but has neglected and refused to do so.

Your petitioner is the sister of said Selma D. Aberlin and the aunt of said minor child.

Your petitioner further represents that the happiness and welfare of said minor child require that she should have temporary custody and possession of her.

Wherefore your petitioner prays that this Honorable Court will make such order as it deems expedient concerning the case, custody, education and maintenance of said minor child.

Lenore A. Zisman

Dated this 24th day of March, 1955.

Plaintiff's Exhibit 1.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

At a Probate Court holden at Boston, in and for said County of Suffolk, on the twenty-fifth day of March in the year of our Lord one thousand nine hundred and fifty-five.

On the petition of Lenore A. Zisman, of Stoughton in the County of Norfolk, maternal aunt of Dorothy Gail Aberlin, daughter of Selma D. Aberlin, libellant in divorce proceedings against Isadore J. Aberlin, libellee, praying that the decree nisi entered in said Court on May 15, 1953 may be modified, and, said Lenore A. Zisman be given temporary custody of said minor child, and it appearing to the Court reasonable and proper that the prayer of said petition should be granted.

It is decreed that said decree nisi dated May 15, 1953 be and the same hereby is modified, and said Lenore A. Zisman to have temporary custody of minor child, Dorothy Gail Aberlin, until the further order of the Court.

ROBERT GARDINER (illegible)
Judge of Probate Court.

Plaintiff's Exhibit 1.

No. 51148

Aberlin v. Aberlin

PETITION, CITATION AND DECREE

for

Temporary Custody of Minor Child

Filed March 25, 1955.

Returnable 19 .

Allowed March 25, 1955.

Recorded Vol. Page

For Petitioner:

James Zisman,
646 Warren St.,
Roxbury, Mass.

For Respondent:

.....

.....

Publication in .....
3/25/55

Temporary custody as requested.

RGW.

Suffolk S. S. Oct. 26, 1955

Probate Court

A true Copy. Attest

HENRY J. ALLEN,
Asst. Register.

Plaintiff's Exhibit 2.

TELEGRAM, ANNEXED TO FOREGOING AFFIDAVIT.

WESTERN UNION

Charge to the account of 1955 April 1

Time Filed: PM 4 13

To Isadore J. Aberlin N. H. G. New York.

April 1, 1955

Street and No. 165 West 20th Street.

Care of or Apt. No. New York, N. Y.

Returning Gail to Boston by authority court order. Letter follows.

JAMES ZISMAN

JAMES ZISMAN,

646 Warren St.,

Roxbury, Mass.

Highlands 2-6119

Plaintiff's Exhibit 3.

JAMES ZISMAN
Attorney at Law

Highlands 2-6119

Regent Building
646 Warren Street
Roxbury 21, Massachusetts

March 31, 1955

Isadore J. Aberlin
165 West 20th Street
New York City, N. Y.

Dear Jack:

On March 25, 1955 by order of the Probate Court for the County of Suffolk held at Boston, a decree was entered whereby Lenore A. Zisman, maternal aunt of Dorothy Gail Aberlin, daughter of Selma D. Aberlin, was given temporary custody of said minor child until the further order of the Court.

Acting under authority of this court order, I am returning Gail to Boston and she will live with us at 121 Marjorie Road, Stoughton, Mass. Arrangements will be made for school and such other details as may be necessary.

I regret exceedingly that it has been deemed necessary to take this action, but there was no alternative, since I had not heard from you following our telephone conversation on Sunday, March 13, 1955 at which time you told me that you would be in touch with me before the end of the week. Frankly, I am at a loss to understand the reasons for your change of mind after I first spoke to you in New York on Saturday, March, 5, 1955, at which time you seemed entirely in accord with the plan to have Gail come to live with us in Stoughton until such time as Selma would feel

Plaintiff's Exhibit 3.

better. You agreed then that Gail would be much better off to live with us in a pleasant home where she could go to school and also have a chance to be with children of her own age. I can asure you, both Lenore and myself intended then as we do now to do everything in our power to give Gail a happy home amidst pleasant surroundings. I explained to you then that I thought it would be a wonderful thing for Gail to live with us out in the country with plenty of fresh air and pleasant surroundings. I think it would have been most unfair and unkind to deprive Gail of this opportunity, particularly at this time. It is unfortunate that you could not perceive the wisdom of this and thus make it necessary to take court action.

I will ask that you pack up all of Gail's clothing and personal effects and send them by express as soon as possible to our address in Stoughton. Furthermore, I would also request that the weekly support payment of $25.00 be sent directly each week to Mrs. Zisman at the Stoughton address.

You may be assured that both Mrs. Zisman and myself will do everything in our power to give Gail a happy and contented home.

Very truly yours,

JAMES ZISMAN,
James Zisman

JZ:laz

Plaintiff's Exhibit 5.

TO THE HONORABLE THE JUDGES OF THE PROBATE COURT IN AND FOR THE COUNTY OF SUFFOLK:

In the matter of petition of Leonore A. Zisman, of Stoughton in the County of Norfolk, dated March 25, 1955, maternal aunt of Dorothy Gail Aberlin, daughter of Selma D. Aberlin, libelant in divorce proceedings against Isadore J. Aberlin, libelee, praying that said Lenore A. Zisman be given temporary custody of said minor child.

Now comes the said Lenore A. Zisman and moves that the decree entered March 25, 1955 on the foregoing petition, granting temporary custody of said minor child, Dorothy Gail Aberlin, to the said Lenore A. Zisman be vacated as of March 25, 1955, and that the decree entered May 15, 1953, granting custody of said minor child to the libellant Selma D. Aberlin, be in full force and effect.

LENORE A. ZISMAN
Lenore A. Zisman

Plaintiff's Exhibit 5.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

At a Probate Court holden at Boston, in and for said County of Suffolk, on the twenty-third day of September in the year of our Lord one thousand nine hundred and fifty-five.

ON the petition of Lenore A. Zisman, of Stoughton, in the County of Norfolk, maternal aunt of Dorothy Gail Aberlin, daughter of Selma D. Aberlin, libellant in divorce proceedings against Isadore J. Aberlin, libellee, praying that the decree of March 25, 1955 giving temporary custody of minor child, Dorothy Gail Aberlin to said maternal Aunt, Lenore A. Zisman, be vacated and that the decree nisi entered May 15, 1953 granting custody of said minor child to the libellant, mother, Selma D. Aberlin be in full force and effect.
and it appearing to the Court reasonable and proper that the prayer of said petition should be granted.

It is decreed that said decree nisi dated May 15, 1953 granting custody of the minor child of the parties, Dorothy Gail Aberlin to the libellant, Selma D. Aberlin be in full force and effect, until the further order of the Court.

JOHN V. MAHONEY,
Judge of Probate Court.

Plaintiff's Exhibit 6.

Letter—

Aug. 18, 1954

Jack:

My father has just told me that Gale belongs with you. I am glad that I've turned her custody over to you.

Please see that she gets good care wherever you place her. I've taken all that I can.

It will be easier to tell her I am dead!

SELMA

Plaintiff's Exhibit 7.

July 13, 1954.

Dear Jack,

The enclosed Camp bill—for Gale arrived today.

I am going to request that Gale's trunk and other luggage be shipped to New York to your address from the Camp when the season is over.

She will also arrive at Grand Central Station with the New York group. "She" will be in your custody legally by that time. I am waiting to hear from you as to the attorney I am to engage in the matter.

SELMA

P. S. I was informed there is sufficient time to get the matter settled.

Plaintiff's Exhibit 7.

I have no intentions of changing my mind or creating any scenes before Gale or any court. Neither of us have to be present. The signed paper is presented to a Judge by whoever attorney handles it, and mailed to you. You and I will then be finished completely. The one hundred dollars per month will automatically be cancelled, and I will not be able to hold Gale over you any longer.

I'll expect to visit Gale with you, and perhaps we can both tell her, or perhaps you'd rather wait until you bring her back to New York. I will not interfere any longer and cause anymore emotional disturbances to that child. I don't want her to grow up and be like her mother.

Kindly accept this as it is written. You have my word—it is my bond. You'll have enough time to make preparations for her. Get an apartment housekeeper or remarry. I won't report you for marrying before your time. It is none of my business. I want to know that Gale has some sort of future and home life. Something she has never had . . .

Any trouble I made for you in the past was due to the fact I was trying to secure support for her. It was my main reason for obtaining a divorce. I hurt myself. I have to live with myself—.

Despite the fact that you say you never bother to read any of my letters I hope you will make exception to this one; because Gale will be in for a terrible shock; and that is not my intention. As long as she hates me now—it is better that she leaves me before anything happens.

SELMA.
Selma

Encs. 2

Plaintiff's Exhibit 8.

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
200 Newbury Street, Boston 16

August 27, 1954

To Whom It May Concern:

Due to illness and financial circumstances beyond my control, it is necessary for me to turn the custody of my daughter Dorothy Gale Aberlin over to her Father:

Mr. Isadore J. Aberlin
165 West 20th Street,
New York, N. Y.

I will regret the above decision for the rest of my life; but I have no other alternative.

SELMA DIANE ABERLIN
Selma D. Aberlin

P. S. I pray that he will attempt to care for her as I have. have.

Judgment.

UNITED STATES DISTRICT COURT,

DISTRICT OF MASSACHUSETTS.

No. 56-215-S, CIVIL ACTION

ISADORE ABERLIN,

Plaintiff,

v.

JAMES ZISMAN and LENORE ZISMAN,

Defendants.

SWEENEY, CH. J. After trial and in accordance with the verdict of the jury, it is hereby

ORDERED Judgment for the defendants with costs taxed at $ .....

By the Court,

s/ HELEN I. TWEEDY,
Deputy Clerk.

December , 1956.

s/ GEO. C. SWEENEY,
Chief Judge, U. S. District Court.

Entered December , 1956.

JOHN A. CANAVAN, Clerk,

by s/ Helen I. Tweedy,
Deputy Clerk.

Plaintiff's Notice of Appeal From Judgment.

Notice is hereby given that Isadore Aberlin, plaintiff above named, hereby appeals to the United States Court of Appeals for the First Circuit, from the final judgment entered in this action on December 6th, 1956.

Dated: December 14th, 1956.

RICHARD L. WILDER,
Attorney for Plaintiff,
11 Beacon Street,
Boston, Massachusetts.

Plaintiff's Motion for a New Trial.

Now comes the plaintiff, through his attorney of record, and moves this Honorable Court for a new trial in the above entitled cause and for reasons states as follows:

1. The verdict was contrary to the law.
2. The verdict was contrary to the evidence.
3. The verdict was contrary to the weight of the evidence.
4. It was error for the Court to instruct the Jury prior to final argument by counsel.
5. It was error for the Court to fail to direct a verdict for the plaintiff as requested.
6. It was error for the Court not to instruct the Jury as requested by the plaintiff.
7. And for such other and further reasons as may be presented at the hearing on this motion.

By his attorney:

RICHARD L. WILDER

Plaintiff's Notice of Appeal From Order.

Notice is hereby given that Isadore Aberlin, plaintiff above named, hereby appeals to the United States Court of Appeals for the First Circuit, from the denial of his motion for a new trial made in this action on December 26, 1956.

Dated: January 21, 1957.

RICHARD L. WILDER,
Attorney for Plaintiff,
11 Beacon Street,
Boston, Massachusetts.

Office Supreme Court, U.S.
FILED
AUG 13 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 373

ISADORE ABERLIN,

Petitioner,

against

JAMES ZISMAN and LENORE ZISMAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

DORA ABERLIN,
Attorney for Petitioner,
11 Broadway,
New York 4, N. Y.

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statutes Involved 4

Facts 5

Reasons for Granting the Writ 6

Conclusion 23

CASES CITED

Baker v. Baker Eccles & Company, 242 U. S. 394 8

Brinkerhoff-Faris Trust & Savings Company v. Hill, Treas. etc., 281 U. S. 673 22

Commonwealth v. Nickerson, 5 Allen (Mass.) 518 ... 11

Eliot v. McCormick, 144 Mass. 10 8

McDonald v. Mabee, 243 U. S. 90 8

Meyer v. Nebraska, 262 U. S. 390 16

Needham v. Thayer, 147 Mass. 536 8

Pickle v. Paige, 169 N. E. 650, 252 N. Y. 474, 72 A.L.R. 842 11

Price v. Nickerson, 9 Allen 478, 91 Mass. Rep. 478, 85 Am. Dec. 777 11

Stowe v. Heywood, 7 Allen (Mass.) 118, 89 Mass. Rep. 118 11

Williams v. Fears, 179 U. S. 270 14

Windsor v. McVeVigh, 93 U. S. 274 22

Statutes and Rules Cited

	PAGE
Chapter 208, Ano. Laws of Mass., Section 28	4, 8
Chapter 208, Ano. Laws of Mass., Section 30	4, 15
New York Penal Law, Section 1250, Subdivision 2	9
New York Penal Law, Section 1252	10
United States Constitution, Amendment I	2, 7
United States Constitution, Amendment XIV, Section 1	2, 7
Appendix A:	
Statutes Involved	24
Appendix B:	
Opinion of the United States Court of Appeals, for the First Circuit	26
Letter Amending Decision	31

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. .....

ISADORE ABERLIN,

Petitioner,

against

JAMES ZISMAN and LENORE ZISMAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the First Circuit, dated May 21, 1957.

Petitioner appealed from a judgment in the United States District Court, District of Massachusetts in favor of the defendants after verdict by the jury and from an order of the court denying plaintiff's motion for a new trial. The United States Court of Appeals for the First Circuit dismissed the appeal from the judgment on technical grounds but held the appeal from the order brought up for review all errors in the judgment and then affirmed the order denying plaintiff's motion for a new trial. The appeals were taken on the ground that the verdict was contrary to and against the weight of evidence and contrary to law, and that the erroneous verdict was brought about by the serious errors of the trial court in

its charge to the jury on the law and by the prejudicial and erroneous errors in rulings during the trial, and the conduct of the trial in general.

The consolidated record-appendix in this case as printed for the Court below, together with such additions as are necessary to show the opinions and proceedings in the United States Court of Appeals are filed herewith in accordance with the rules of this Court.

Opinions Below

The decision of the Court of Appeals was filed May 21, 1957, and thereafter amended on May 27, 1957. It is reported at 244 Fed. Rep. 2nd 620.

The original opinion and the copy of the letter amending same are printed on pages 26-30 of the appendix herein.

Jurisdiction

The decision of the Court of Appeals was filed May 21, 1957 and amended May 27, 1957.

The jurisdiction of this Court is invoked under 28 USCA., section 1254, subd. 1.

The jurisdiction of the District Court of Massachusetts was invoked for diversity of citizenship, the plaintiff being a resident of and domiciled in New York and the defendants in Massachusetts.

Questions Presented

The questions herein presented were raised on the trial of this action by requests to charge and by objections to the trial court's refusal to charge as requested and to rulings during the trial and to the charge to the jury.

1. Does a State which has granted a decree of divorce and awarded custody of children, retain such control over the children as wards of the Court as to have authority to modify such decree with respect to custody, without service or notice upon either or both natural parents, and even when the child or children are no longer within the state?

2. Whether after a decree of divorce awarding custody to one parent as against the other and in the absence of a finding of unfitness of the parent to whom custody was not awarded, the parents could consent to remove the child from the jurisdiction of the state conferring custody, and voluntarily transfer custody from one to the other as the needs of the child required without first obtaining permission and consent for such transfer and modification of the custody decree from the court originally making same.

3. Whether a custody order issued in violation of due process without notice or service upon the natural parent is effective beyond the boundaries of the state issuing it, to confer immunity upon a private person acting under such order in violation of the criminal statutes of another state and to confer immunity upon such person from civil liability for his tortious acts.

4. Whether a state may issue orders and condone acts and make decisions which violate the criminal statutes of another state.

5. Has a divorced father to whom custody of children has not been awarded, in the absence of any finding of unfitness, lost all his common law rights to his children and been freed of all obligation to them except the duty to support, so that if the mother subsequent to the decree becomes unfit, or unable to care for them and turns the children over to him without obtaining modification of the decree, any relative or stranger may petition the

courts and obtain custody of such children without notice to the father?

6. What is the meaning of "legal custody", and what rights, privileges and duties does it entail?

7. When a father, to whom custody has not been awarded, by decree, has actual physical custody of children with the mother's consent and while she is actually a patient at a mental hospital, may any relative or stranger seize those children, without valid court order, and be immune from civil or criminal prosecution simply because the father did not obtain modification of the custody decree before assuming the care of the children?

8. Whether the trial court committed prejudicial error and deprived the father of his constitutional rights by failing and refusing to follow the statutory, usual and accepted modes of practice and procedure?

Statutes Involved

Annotated Laws of Mass., Chapter 208, Section 28 and 30.

New York Penal Law Section 1250, subdivision 2 and Section 1252.

United States Constitution Amendments IV and XIV; Section I.

Facts

This is an action by the father of a minor child for damages for the unlawful abduction of his child by the defendants and the conspiracy to abduct her.

Another facet of the litigation arising from the abduction is already before this court on a petition for certiorari, numbered 346 for the October 1957 term.

The facts, as has already been pointed out in the other petition for certiorari, are undisputed, scarcely need repetition, and were admitted by the defendants on the trial. However for the sake of clarity they will be briefly repeated.

The infant, Dorothy Gail Aberlin, then 10 years of age, on April 1, 1955 was living with her father in New York (R. 10, 11, 22, 26, 27, 28, 29, 49). Her mother and father had been divorced in Massachusetts and her custody had been awarded to the mother (R. 49). The father consented to the award of custody and voluntarily agreed to pay $25.00 per week for her support. The child lived with her mother in Boston until the summer of 1954, when she was sent to Maine to Camp for the summer and then to New York to her father (R. 57). In September of 1954 the mother established residence in New York and obtained employment in New York (R. 26). In February, 1955 the mother herself again turned the child over to the father and went into Bellevue Hospital in New York for psychiatric examination (R. 26, 27, 28, 29). Her commitment was there recommended and proceedings therefor instituted (R. 29, 43). On March 5, 1955, the defendant Zisman, an attorney in Massachusetts and her brother-in-law went to Bellevue Hospital obtained her release to him on condition that he place her in a hospital for the mentally ill in Massachusetts. On the same day he took her to Boston and she was there immediately admitted to Mattapan State Hospital at Boston as a mentally ill person (R. 42, 43). On March 10, 1955, she was formally adjudicated insane by Judge Mahoney of the Suffolk County Probate Court (R. 43, 44, 45).

Thereafter the admitted facts show that the Zismans demanded that the child be sent to live with them (R. 31, 33, 34). The father refused. On April 1, 1955, without notice or warning, the defendant Zisman admitted he went to New York, and with a "family friend" who knew where the child was going to school, waited outside the school,

took the child and transported her to Boston (fols. 10, 11, 12). Only after he had taken the child did he send any notification to the father (R. 13, 14, 33, 34). On boarding a bus to leave New York he gave the "family friend" a letter to mail to the father and instructed her to send the father a telegram (R. 12, 13, 33, 34). Thereafter the Zismans demanded money from the father for the child's support and refused to return the child (R. 14, 15, 54). It is admitted that on the day Zisman took the child, her mother was an adjudicated incompetent patient at Mattapan State Hospital.

The Zismans as a defense for their actions claimed that they took the child by virtue of an alleged order of the Probate Court of Suffolk County, Massachusetts dated March 25, 1955, awarding temporary custody to Mrs. Zisman (R. 50, 51, 52). It is admitted that this order was obtained without notice or service of any kind upon the father (R. 10, 32, 34). It is further admitted that this order was obtained by the Zismans on an allegation that the child was being "improperly cared for" although neither Zisman nor his wife had any knowledge as to the circumstances under which the child was living (R. 8, 9, 10, 22, 23). It is further admitted and the record shows that this order was subsequently vacated on September 23, 1955, as of the day it was granted. As a further defense to their actions the defendants Zismans alleged that they did not take the child forcibly or by fraud but that she went willingly.

Reasons for Granting the Writ

In the case at bar, the United States Court of Appeals in its opinion states:

> "The mother, not being well and being on the verge of a nervous breakdown, asked the father to take care of the girl and the child was physically transferred to

New York City to live in an apartment occupied jointly by the father and by his sister Gertrude Aberlin. For a short time the mother who had gone to New York, received treatment at the Bellevue Hospital. Later at the instance of her sister, Lenore A. Zisman and of her brother-in-law James Zisman, the latter two being defendants herein, the mother was brought back to Massachusetts; and for a time the mother was legally committed to the Boston State Hospital.

While this commitment was outstanding, the Probate Court for Suffolk County on March 25, 1955 entered a decree awarding temporary custody of the minor child to her aunt Lenore Zisman. It is claimed that this decree was void for lack of Notice to the father.

At any rate, armed with this decree defendant James Zisman journeyed to New York, found the little girl at school and persuaded her to accompany him back to the home of the two defendants in Stoughton, Mass., where she stayed for several months. There was no evidence that this removal was accomplished by the use of any force or fraud practiced upon the girl, who testified that she went willingly and that her life with her aunt and uncle was a happy one. On the other hand, it is clear that the father had no advance knowledge of this planned removal and did not give his consent thereto. * * *"

The Order for Temporary Custody Violated Due Process and Is Void

On the very facts as given in its own opinion, the decision of the United States Court of Appeals for the 1st circuit is in conflict with the Constitution of the United States, 4th and 14th amendments, the decisions of the Supreme Court and the laws and decisions of both New York and Massachusetts.

It seems scarcely necessary to argue that a custody decree made by Massachusetts while the child was admittedly living with her father, with her mother's consent and through her mother's affirmative acts, without notice to the father, was void, unconstitutional, in violation of due process and powerless to confer any rights or bind any court.

It is such well settled law that no court may render effective judgments without due process of law, that the citations seem superfluous. Where the process by which the Court claims jurisdiction is merely questionable, the judgment is voidable. But where there has been no service or notice of any kind, the Court never obtained jurisdiction and any judgment rendered by it without jurisdiction is absolutely void.

Baker v. *Baker Eccles & Company,* 242 U. S. 394;
McDonald v. *Mabee,* 243 U. S. 90;
Needham v. *Thayer,* 147 Mass. 536;
Eliot v. *McCormick,* 144 Mass. 10.

In the case at bar the order giving the Zisman's temporary custody was absolutely void. No pronouncement of any Court can endow it with validity.

The invalidity of the order becomes even more pronounced upon examination of the law of Massachusetts itself with respect to the modification of custody decrees. In Chapter 208 of the Annotated Laws of Massachusetts, Section 28, the law states—"Upon decree of divorce or petition of either parent, or of a next friend in behalf of the children, *after notice to both parents,* after decree (italics ours) the Court may make etc."

The order giving Mrs. Zisman temporary custody being absolutely void, cannot give any cover or protection to the Zismans for the abducting of appellant's child. Plaintiff requested the trial Court to so instruct the jury (Requests to charge Nos. 11, 12, 13, 19, 20 (R. 47, 48)).

It was reversible error for the trial Court to refuse to so instruct the jury.

The Decision Is in Conflict With Both New York and Massachusetts Law and Decisions Under Which the Taking of the Child Without the Knowledge or Consent of the Father Is a Crime as Well as a Tort

The taking of the child by Zisman was a wrongful act. The Trial Justice in the District Court in his charge excused this wrongful act and immunized the perpetrators by charging the jury that if the child went willingly without force or fraud, there was no kidnapping and the father could not recover and that in any event only the "legal" guardian could recover. The United States Court of Appeals ignored the issue of whether the consent of a 10 year old child was a defense but held with the District Court, that only the "legal" guardian of the child had any rights and the father not being the "legal" guardian no tort was committed as against him and he had no cause of action.

Both these decisions are contrary to both New York and Massachusetts Law.

Under the New York Penal Code, Section 1250, Subdivision 2, it is unlawful to take a child from anyone who has lawful care or control thereof, and that one who does so is guilty of kidnapping which is a felony.

> "A person who wilfully: 2. Leads, takes, entices away, or detains a child under the age of sixteen years, with intent to keep or conceal it from its parents, guardian, or *other person having the lawful care or control thereof,* or to extort or obtain money or reward for the return or disposition of the child, or with intent to steal any article about or on the person of the child;
>
> • • •
>
> Is guilty of kidnapping, which is a felony • • • ." (Italics ours.)

Under Section 1252, the consent of a child under 16 is no defense to the crime of kidnapping.

On the facts as stated by the United States Court of Appeals itself, the father certainly had lawful care and control of the child when she was taken from him even if he didn't have legal custody. When his child was taken from him under a void order, a crime was committed, *prima facie* at least. Ignoring Section 1252 of the New York Penal Code, the Trial Justice went to great trouble in interrogating the child, to show the jury that the child went willingly with her uncle (R. 23, 24). Then he went to great lengths in his charge to tell the jury that if there was no evidence of force or fraud there was no kidnapping (R. 38, 41). In his charge the Trial Court states: "Now kidnapping to be legally such must be accompanied by force or fraud. If you find in this case there was neither force nor fraud, then there was no kidnapping and your answer to both questions must be No." The jury under his charge and from the answers elicited by the Court itself was compelled to find against the plaintiff and for the defendant. This charge is so erroneous and so contrary to law, that in and of itself it is sufficient to require reversal and is the crux of the whole case. The act of kidnapping was done in New York. New York law controls. New York law says a child under 16 may not consent to be taken from her lawful guardian or person lawfully in charge of her. This child was 10 years old when she was forcibly snatched. Her testimony of her willingness to go cannot excuse the defendants or save them from answering for a crime under New York Law.

Shall it be said that the law requires stricter interpretation for the commission of a tort than a crime, and that although a crime was committed, there was no tort because the father did not have legal custody.

Even under Massachusetts decisions the consent of so young a child can be no defense to her illegal taking and a crime as well as a tort was committed.

In *Commonwealth* v. *Nickerson*, 5 Allen 518, the Massachusetts Court held that no evidence of malice need be shown to entitle the father to recover damages for the abduction of his child, and that a child of nine years was incapable of giving a valid consent to his taking. In this case the Court of Massachusetts held that the mere taking of the child was sufficient to sustain an indictment for assault and battery and false imprisonment of the child and the defendant was found guilty of a crime.

The Trial Court in its charge to the jury stated (fol. 35):

> "I'm very frank to say to you that under Massachusetts law, if we were applying the law of Massachusetts alone, there could be no recovery for the so-called abduction or kidnapping of the child; but we are governed in most respects by the laws of the State of New York where the alleged kidnapping took place."

These were highly prejudicial and erroneous statements and directly contrary to the law of Massachusetts as well as New York As a matter of fact, the leading case in New York *Pickle* v. *Paige*, 169 N.E. 650, 252 N. Y. 474; 72 A.L.R. 842, cites the Massachusetts cases in support of its findings (p. 478), and also holds that the father is entitled to punitive as well as compensatory damages without proving loss of service.

In *Stowe* v. *Heywood*, 7 Allen (Mass.) 118, 89 Mass. Rep. 118, the Massachusetts Court held that a father was entitled to recover for mental suffering when his child was abducted.

In *Price* v. *Nickerson*, 9 Allen 478, 91 Mass. Rep. 478, 85 Am. Dec. 777, the Massachusetts Court held that a father whose child was abducted, may recover reasonable expenses incurred in pursuit of his child, even though there is no evidence that the abduction was malicious. In

this case it was also held that the assent of the child was no defense.

The misleading and erroneous statement of the law in the charge to the jury were highly prejudicial and went to the very core of the father's rights and warrants the setting aside of the jury's verdict. The law of both jurisdictions follows the common law giving the father the right to recover both punitive and compensatory damages. The law of both states make such a taking a crime. The Trial Court in its charge also minimized the father's right to damages (R. 38, 39) and refused to instruct the jury as requested in request #18 (R. 48). This was serious error and warrants reversal.

The Massachusetts Order for Temporary Custody Even if Valid in Massachusetts Had No Validity Outside Massachusetts and Could Not Confer Immunity Upon Child's Abductors in New York

Even if the order awarding Mrs. Zisman temporary custody was valid in Massachusetts it had no validity outside Massachusetts and could not be acted upon in New York without a supplementary order of a court of competent jurisdiction in New York. It was error for the Trial Court to refuse to so charge.

It is well settled law requiring no citation that no state has power to execute on its judgments or orders outside its own boundaries. Any money judgment or judgment awarding chattels to be enforced in another state, must be sued on in the state where its enforcement is sought. Even if the order giving Mrs. Zisman temporary custody was valid in Massachusetts it could not be executed in New York without the aid of New York Courts. Zisman could not come into New York with a money judgment and seize the appellant's automobile on execution without first getting a New York judgment and the assistance of a sher-

iff. Yet in the case at bar, armed with a void Massachusetts order, without notice or warning, without the assistance of a New York Court, without the assistance of a sheriff, the defendant Zisman himself, seized the child and transported her. Appellant requested the Court to so instruct the jury, requests to charges 13, 14, 15, 16, 17 (R. 47, 48) and additional oral request (R. 40) but the Trial Court refused to so charge. As a matter of fact, the Court in a further charge to the jury (R. 41) instructed the jury that Zisman was under no obligation to do so. Shall it be said that Zisman had the right to seize a child under circumstances under which he could not seize a chattel?

Under the Liberties Guaranteed by Our Constitution the Father Had Lawful Custody of the Child for Even Divorced Parents May Agree With Each Other as to Custody

The appellant requested a directed verdict. In the face of requests 1 and 2 (R. 46) of the overwhelming evidence and on the law it was reversible error for the Court to refuse to direct the verdict.

There is no doubt that a tort was committed for which the Zismans are answerable. The Trial Court and the Court of Appeals both held that such tort-feasors are answerable if at all only to the "legal" guardian and then defined legal guardian as the person to whom custody was awarded by Court decree. Such findings are not only incompatible with the New York Penal Code, but utterly incompatible with common sense.

When the mother became an adjudicated incompetent and actually incarcerated in a hospital, it was not only the father's right but his duty to step forward, take his child and care for her. He needed no decree of any man made Court to follow the dictates of nature and conscience.

In the case at bar he further had the child thru the mother's own acts prior to her commitment. If the United States Court of Appeals and the Massachusetts District Court are correct, then anyone, even a stranger could come into New York and seize that unfortunate child while the mother was helpless and a patient in a mental institution and the father could have no redress and no relief.

Such rulings could establish most dangerous precedents. To permit them to stand is to subject the unfortunate child victim of divorce and mental illness of her parents, to additional unthinkable hazards, to make her a prey of any unscrupulous scoundrel who saw an opportunity to commit kidnapping with impunity. Such rulings rob the competent parent, innocent of wrongdoing, not only of his child but of his stature and dignity as a man and a father.

The father claims that he had the right to his child both by the operation of law and the affirmative acts of the mother. The United States Court of Appeals in its opinion finds that the mother actually turned the child over to the father prior to her adjudication.

In this free country of ours may not even divorced parents under the liberties guaranteed them by the 14th amendment, freely transfer custody from one parent to the other as need dictate, or has the state by granting a decree of divorce and awarding custody obtained such legal title to the child as to necessitate re-application to her Courts for any change whatsoever.

The fourteenth amendment guarantees that the privileges and immunities of citizens shall not be abridged. One of these inalienable rights is the right to move from one state to another. In *Williams* v. *Fears*, 179 U. S. 270, the Court states on page 274:

> "Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the

right, ordinarily of free transit from or through the territory of any state is a right secured by the Fourteenth Amendment and by other provisions of the Constitution."

The position taken by the Massachusetts Courts that Massachusetts still had jurisdiction over the child in spite of her removal from the state is repugnant even to the laws of Massachusetts itself, for under Chapter 208, Section 30 of the annotated laws of Massachusetts minor children of divorced parents over whom the Superior or Probate Court has jurisdiction shall not be removed from the Commonwealth *without the consent of both parents.* (Italics ours.)

It cannot by any stretch of the imagination be claimed that the child in the instant case had not been brought into New York with the *consent* of *both* parents. Even under Massachusetts Law which might on test be held unconstitutional, where both parents have consented, the child is validly without the jurisdiction and Massachusetts has lost the power to stretch her arms beyond her own boundaries.

In any event, there is *nothing* in the laws of Massachusetts or the laws of New York, which is authority for any finding, that even after divorce and award of custody to one parent or the other, the parents may not agree with each other, in the absence of any finding of unfitness of either parent, to transfer the custody from one parent to the other as suits the needs and welfare of the child. Custody in the first place is awarded, in cases of dispute, to the parent most suited at the time to care for the child. Custody is not awarded either as a reward or punishment. It does not confer absolute legal title to the child to the one obtaining custody, as a deed does to real estate. A child is not a chattel. The mere fact that one parent feels unable to care for the child should be sufficient reason to

transfer the custody to the parent who is able. To hold that while living in New York, the parents had to go back to Massachusetts and get a decree permitting the father to care for his own child during the mother's illness and with the mother's consent, is indeed vesting a state, not with democratic but totalitarian powers and is repugnant to our basic principles of freedom.

In *Meyer* v. *Nebraska*, 262 U. S. 390, Mr. Justice McReynolds, delivering the opinion of the Court partially defines due process as guaranteed by the fourteenth amendment, on page 399:

> "While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

To hold that a divorced couple may not freely transfer custody of their children to each other as the need arises, is interference by a court in a case where the divorced parents do not seek interference and is an unwarranted infringement of liberty and denial of due process.

The Father Was Denied Due Process by the Conduct of the Trial. This Is a Case Justifying the Invocation of the Supreme Court's Supervisory Powers

Not only is the decision of the United States Court of Appeals affirming the District Court in conflict with the constitution of the United States and with Massachusetts

and New York decisions, but the trial itself was conducted in such total disregard of the ordinary rules of evidence and practice and procedure as to justify the invocation of the supervisory powers of this Court.

The Trial Court openly stated that it would not upset the Suffolk County Probate Court decrees, and conducted the trial accordingly. No effort was made to hide the fact that the Probate Court was to be upheld, Zisman's act of kidnapping minimized and the father denied any redress. That this was done to save face for the Probate Court whose initial unlawful act in giving an ex parte custody decree without notice to or service upon the father, precipitated all this litigation, does not minimize its reprehensibility. That it was done to save Zisman from possible prosecution for a criminal act likewise does not excuse the failure of the trial Court to follow the law. Zisman was a grown man, an attorney of 28 years standing, and is answerable for his actions. The following is only a brief and spotty outline of some of these highly erroneous and prejudicial rulings during the conduct of the trial.

The Court refused to permit testimony of the lack of proper legal proceedings in New York to enforce the alleged Massachusetts Probate order awarding custody (R. 14).

The Court permitted testimony of telephone conversations had *not* in the presence of plaintiff (R. 16).

The Trial Court made the statement (R. 17):

> "This is a family disturbance I am going to try it wide open. You may answer."

Thereafter, after making this statement the Trial Court violated almost every rule of evidence and proper trial procedure.

The witness Mrs. Zisman was permitted to testify as to conversations with her own husband, not in the presence of

plaintiff and telephone conversations had by her husband allegedly with a doctor in New York (R. 17).

The Trial Court itself asked the witness to testify as to a conversation with the witness's deceased father and again over objection at line 5, stated:

> "I will allow it. I said this is a family disturbance, I am going to try it wide open, get the true picture here, if we can."

Thereafter the witnesses testified to anything they pleased completely unhampered by any rules. Conversations with various people including doctors, all not in the presence of plaintiff, were permitted in evidence.

The defendant witness was permitted over objection to testify as to alleged conversations with the insane mother at the hospital, all not in the presence of the plaintiff (R. 19).

The defendant witness was permitted to put into evidence self-serving letters written by him to plaintiff's sister (Deft's. Exhs. B and C) (R. 20).

The Court allowed the witness to testify as to alleged doctor's findings without any vestige of proof as to their actuality or authenticity and stated at line 16,

> "I will allow it, I want the whole picture." (R. 21)

The Trial Court stated (R. 23):

> "You are getting far afield. I am not going to upset any Probate Court decree."

This was a prejudicial remark. If the Probate decree giving Mrs. Zisman temporary custody was void and unconstitutional because obtained without notice or service, the Trial Court was under duty to recognize that fact and had no authority or right to try to invest an absolutely void

order with legality. The Court in this respect should have charged as requested in plaintiff's requests Nos. 11, 12, 13, 14, 19 and 20. Any Court of any state may and should refuse to give weight to a void order or decree obtained without service or notice and in violation of due process and the Constitution of the United States.

The Court itself undertook the defendant's defense and interrogated and led the child witness to bring out that the child had gone willingly with her captors and had not been induced by false promises (R. 23 and 24).

The Court would not permit proper cross-examination of the witness as to prior admitted perjuries (R. 24).

The Trial Court refused to permit the plaintiff to testify that he had never consented to the taking of his child (R. 31).

A similar ruling (R. 31).

The Court allowed an alleged conversation with the child not in the plaintiff's presence (R. 32).

On page 116 of the Stenographic Record (R. 32) the Court, over objection ordered the plaintiff's sister, his attorney in New York and sitting as co-counsel in this case, to testify, although absolute privilege was asserted, stating, "The prividege is not extended so far. There is no question of privilege here."

These are only a few of the examples of the Court's erroneous rulings and the way the trial was conducted.

There is no authority in any law for the type of trial procedure that was here used. There is no authority known to appellant's attorneys for the complete abandonment of all rules of evidence and proper trial procedure and for the breaking of the seal of privilege between attorney and client. A child was kidnapped from her father while her mother was ill. It is not for the Trial Court to

excuse such conduct and manipulate a trial to save the defendants from answering for their acts, as to save face for the Probate Court which issued a void and unconstitutional order. The Trial Court in its charge (R. 38) repeated,

> "You heard me say several times during the trial of this case when either side may have objected, that I was going to try the case wide open. By that I meant, I was going to liberalize as far as I could legally, the laws of evidence so that you might better understand the actual situation here."

This is indeed most unusual procedure. Where is the authority in law giving a Trial Court the right to so do; to compel a client's own attorney to testify to privileged communications; to permit a defendant witness to testify as to alleged findings of doctors without producing the doctors, without proof that the alleged doctor even existed or had ever made an examination; to permit hearsay and self serving declarations, and conversations held not in the presence of plaintiff?.

After the testimony was completed, the Court then proceeded to charge the jury without permitting counsel to sum up (R. 35) and then when objection was raised (R. 40) told the jury to forget everything and permitted argument. After argument the Court again erroneously charged (R. 40, 41):

> "I don't intend to add much to what I said to you, but some reference has been made to the fact that the father had custody of this child, I say to you as a matter of law that from the moment the probate decree was signed giving custody to the mother, she alone had the legal right to the child until that decree was vacated * * *
>
> I will also call to your attention, that some reference has been made to the fact that Mr. Zisman did not go

to a Court in New York for an agency or something of that nature. If he had any rights in the matter, he wasn't bound to go to those places.

Now again I will refer to the definition of conspiracy as an agreement to do an illegal act. Secondly, I have adverted to kidnapping as a diverting of a person's normal method of living by reason of force or fraud. If you don't find that, then there must be a verdict for defendants."

As has been already pointed out, these charges are in complete contravention of the law. The statement that the mother had "legal custody at all times" in the face of the fact of her incarceration in a mental hospital at the time the child was kidnapped is unrealistic if not ridiculous. Where was the child to go when the mother went to the hospital? To the mental hospital with the sick mother? Was it not only the right but the moral duty and legal obligation of the father to care for that child during the mother's illness? Would any Court, if Mr. Zisman had not kidnapped the child, have excused the father if he had refused to care for his child because he did not have "legal" custody?

The whole case actually seems to revolve around the definition of "legal" custody, and the rights it confers. Does it give legal title to children as a deed does to real estate or a bill of sale to chattels? Or is it the *custodial* aspect only that is paramount, an aspect that should have as its first consideration the care of the child and not the rights of the custodian.

The errors committed during the trial were so flagrant and in such utter violation of all rules of evidence and procedure as to have deprived the father of his constitutional rights to a fair trial. The father has been denied both due process and the equal protection of the laws by the failure of the trial court to follow the fundamental rules of procedure and evidence during trial.

The decisions of the Supreme Court of the United States have held that due process requires proper notice and opportunity to be heard. It has held further that due process requires that the hearing shall be in accord with the usual practice and procedure followed in such cases in the tribunal where heard. None of the rules of practice and procedure of this State have been followed in the instant litigation. Such flagrant disregard of all orderly methods of trial and procedure as directed by legislative enactment is a denial of due process and equal protection and violates the constitution.

Brinkerhoff-Faris Trust & Savings Company v. *Hill, Treasurer, etc.*, 281 U. S. 673;
In *Windsor* v. *McVeigh*, 93 U. S. 274.

This litigation has been brought on by the initial unconstitutional act of the Probate Court of Massachusetts in giving an *ex parte* order for custody to one other than a natural parent, without service or notice and in violation of due process. By so doing the Probate Court brought about what is a criminal kidnapping both under New York and Massachusetts statutes, and precipitated a grievous and protracted litigation, at a price, not counting the cost in money, of untold human suffering. A child has been subjected to great psychologic trauma the full effects of which may not even be recognized for years; a relationship between parent and child has been irreparably impaired, if not destroyed; and an ill and confused woman has been exploited and further frightened and probably retarded in her recovery. The record shows that prior to the kidnapping she had no fear of sending the child to the child's father. But the granting of this void order cannot excuse the defendants. The defendant Zisman himself is an attorney of 28 years experience (R. 8). He knew or should have known what he was doing. He knew that during the mother's illness the father, as a natural parent had the absolute right and duty to care for the child. He knew

that the courts of New York would never take the child from the father under the circumstances. Yet he permitted himself to violate every rule of law and order, ethics and decency; he submitted a false affidavit to the Massachusetts Probate Court "that the child was not properly cared for" he obtained an *ex parte* order without notice or service and then knowingly went into New York and seized a child of tender years and sensitivity from outside her school and literally tore her from her father's arms and then demanded money for her care.

A great wrong has been done to the child, to the father and to the mother. But the wrong is far greater and deeper than the harm to these individuals. The financial cost of the litigation or reimbursement therefor or money to soothe the father's hurts are not the important issues in this case. If the Zismans are permitted to escape all obligation to answer for their deeds, then the most basic principles of our way of life, the most fundamental guarantees of our constitution, to due process and equal protection of the laws have been violated and undermined. If the Zismans and the Probate Court of Massachusetts are upheld in their actions, then a dangerous precedent indeed, will have been established.

CONCLUSION

The U. S. Court of Appeals is correct in one determination. There should have been a directed verdict, but for the plaintiff not the defendants.

For the foregoing reasons it is respectfully requested that certiorari be granted.

Respectfully submitted,

RICHARD L. WILDER,
DORA ABERLIN,
Attorneys for Plaintiff-Appellant.

Appendix A

STATUTES INVOLVED

Chapter 208 of the Annotated Laws of Massachusetts, Section 28—

> "Upon decree of divorce, or petition of either parent, or of a next friend in behalf of the children, after notice to both parents, after decree, the court may make such decree as it considers expedient relative to the care, custody and maintenance of the minor children of the parties * * *"

Chapter 208 of the Annotated Laws of Massachusetts, Section 30—

> "A minor child of divorced parents who is a native of or has resided 5 years within this Commonwealth and over whose custody and maintenance the Superior court, or a Probate Court has jurisdiction, shall not, if of suitable age to signify his consent, be removed out of this Commonwealth without such consent, or if under that age without the consent of both parents, unless the Court upon cause shown, otherwise orders."

New York Penal Law, Section 1250, subdivision 2—

> "A person who wilfully: 2. Leads, takes, entices away, or detains a child under the age of sixteen years, with intent to keep or conceal it from its parents, guardian, or other person having the lawful care or control thereof, or to extort or obtain money or reward for the return or disposition of the child, or with intent to steal any article about or on the person of the child;
>
> * * *

Is guilty of kidnapping, which is a felony * * *"

New York Penal Law, Section 1252—

"Upon a trial for a violation of this article, the consent thereto of the person kidnapped or confined shall not be a defense, unless it appears satisfactorily to the jury that such person was above the age of sixteen years, and that the consent was not extorted by threats or duress. As amended L. 1928, c. 355, eff. Sept. 1, 1928."

United States Constitution, Amendment IV—

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment XIV, Section 1—

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Appendix B

Opinion of Court
Letter May 27, 1957 Amending Opinion

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 5218, 5222.

ISADORE ABERLIN,

PLAINTIFF, APPELLANT,

v.

JAMES ZISMAN ET AL.,

DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

Before MAGRUDER, *Chief Judge,* and WOODBURY and HARTIGAN, *Circuit Judges.*

Dora Aberlin, with whom *Richard L. Wilder* was on brief, for appellant.
James Zisman pro se, and for Lenore Zisman, appellees.

OPINION OF THE COURT.
May 21, 1957.

PER CURIAM. This case arose out of an unfortunate family squabble. Federal jurisdiction was invoked on diver-

sity of citizenship. The complaint charged that defendants, on April 1, 1955, committed a tort to the plaintiff under the laws of New York in that defendants abducted plaintiff's minor daughter from his lawful custody in New York and transferred the girl without plaintiff's assent to Massachusetts. Plaintiff demanded judgment in the sum of $250,000. The district court left the case to the jury, which returned a verdict for defendants. On December 6, 1956, the district court entered judgment for defendants in accordance with the verdict. On December 14, 1956, plaintiff filed his motion for a new trial. The pendency of this motion, undisposed of, temporarily terminated the appealability of the judgment. See Rule 73(a), F.R.C.P.; *Denholm & McKay Co.* v. *Commissioner*, 132 F. 2d 243, 247 (C.A. 1st, 1942). See also *R.F.C.* v. *Mouat*, 184 F. 2d 44; 48 (C.A. 9th, 1950). Therefore, plaintiff's notice of appeal from this judgment, filed December 17, 1956, was premature and a nullity, and this appeal (No. 5218) will have to be dismissed for lack of jurisdiction. On December 26, 1956, the district court entered an order denying plaintiff's motion for a new trial, and plaintiff filed a separate notice of appeal (No. 5222) from this order. Such an order is appealable, as we explained in *Peterman* v. *Indian Motorcycle Co.*, 216 F. 2d 289 (1954); and on such appeal appellant is free to assert any alleged errors which entered into and infected the judgment, the existence of which errors would make it an abuse of discretion for the district court to deny the motion for a new trial. The appeal in No. 5222 is thus properly before us.

Selma Aberlin, a resident of Massachusetts, was plaintiff's wife, and the girl, Dorothy Gail Aberlin, was born of that marriage. By decree of the Probate Court, County of Suffolk, Commonwealth of Massachusetts, entered May 15, 1953, Selma, the mother, was granted a divorce from her husband and was awarded custody of the minor child.

The father was ordered by the decree to pay $25 weekly for the child's support. Subsequently, the father moved to New York and established his residence in that state. The mother, not being well and being on the verge of a nervous breakdown, asked the father to take care of the girl, and the child was physically transferred to New York City to live in an apartment occupied jointly by the father and by his sister Gertrude Aberlin. For a short time the mother, who had gone to New York, received treatment at the Bellevue Hospital. Later, at the instance of her sister Lenore A. Zisman and of her brother-in-law James Zisman, the latter two being the defendants herein, the mother was brought back to Massachusetts; and for a time the mother was legally committed to the Boston State Hospital.

While this commitment was outstanding, the Probate Court for Suffolk County on March 25, 1955, entered a decree awarding temporary custody of the minor child to her aunt Lenore Zisman. It is claimed that this decree was void for lack of notice to the father.

At any rate, armed with this decree defendant James Zisman journeyed to New York, found the little girl at school and persuaded her to accompany him back to the home of the two defendants in Stoughton, Mass., where she stayed for several months. There was no evidence that this removal was accomplished by the use of any force or fraud practiced upon the girl, who testified that she went willingly and that her life with her aunt and uncle was a happy one. On the other hand, it is clear that the father had no advance knowledge of this planned removal and did not give his consent thereto. Eventually the mother was released from commitment, and the Probate Court took appropriate action to restore the original provision of the divorce decree awarding legal custody to the mother.

It is claimed by appellant that, when the mother was committed to the Boston State Hospital, the divorced father, by the common law, became automatically vested with lawful right of custody of his child. In support of this proposition appellant cites *Barry* v. *Sparks*, 306 Mass. 80, 83 (1940). In that case, after a decree of divorce had been entered awarding custody of the child to the mother, the mother subsequently died, and the Massachusetts court said that the divorce decree ceased to have any further continuing effect, "at least when, as here, the decree makes no provision for its continuance beyond the lives of the parents"; with the result that after the death of the mother the rights and obligations of the father with respect to his minor child "are those of a surviving parent, unaffected by the decree which had been entered in the divorce proceedings." That case is obviously inapplicable here, where the mother did not die but at most suffered a transitory period of incompetency.

It seems clear to us that the fact of such temporary incompetency merely gave ground for an application to the Probate Court for a modification of the decree awarding custody to the mother; but it does not follow that the divorced father necessarily would be found by the court to be an appropriate custodian of the child. In *King* v. *King*, 243 App. Div. 780 (1935), subsequent to a decree of divorce awarding custody to the mother she became incompetent; and the divorced father applied to the court for an order modifying the divorce decree as to custody. The court was of opinion that, under the circumstances then existing, "the father should have the custody of the children during the mother's incompetency," and so provided by an order changing the terms of the divorce decree. But clearly, until the father did so apply and so obtain a court order, he did not, by the New York law, become automatically vested with the custody of his children.

Appendix B

In an effort to establish that by the law of New York what the defendants did here amounted to a tort, appellant places great reliance upon *Pickle v. Page*, 252 N. Y. 474, 169 N. E. 650 (1930). In that case the plaintiffs, who were grandfather and grandmother of the child, had legally adopted him upon his abandonment by his mother. Being therefore lawfully entitled to the custody of the child, it was held that the foster parents could sustain an action for damages for injury done to their feelings by reason of the abduction of the child, without the necessity of alleging or proving loss of service. That case is of no help to the plaintiff here, where the father was not the lawfully appointed guardian of the child. If, as plaintiff asserts, the Probate Court's decree awarding temporary custody to the defendant Lenore Zisman was void, the result would be that there was, at the time of the alleged tortious acts, an unmodified decree of divorce dated May 15, 1953, awarding custody of the child to the mother.

On the uncontradicted facts of the case, we have difficulty in understanding why the defendants were not entitled to have the district court grant their motions for a directed verdict. In any event, the court left the case to the jury, which brought in a verdict for defendants, and we find no reversible error.

A judgment will be entered dismissing the appeal in No. 5218 and affirming the order of the District Court in No. 5222.

Appendix B

Office of the Clerk
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ROGER A. STINCHFIELD
Clerk

1602 U. S. P. O. & Court House
Boston 9, Massachusetts

May 27, 1957

To Counsel.

Nos. 5218, 5222
Isadore Aberlin v. James Zisman et al.

Dear Miss Aberlin and Mr. Zisman.

The opinion of this Court in these cases, dated May 21, 1957, has been amended by striking therefrom the full paragraph immediately preceding the words in italics at the end of the opinion and substituting the following: At the close of the evidence, defendants moved for a directed verdict which the District Court reserved under Rule 50(b) F.R.C.P. Even if the jury had returned a verdict for the plaintiff, it seems that the District Court would have been required on the uncontradicted facts of the case to enter judgment for the defendants n. o. v. As it turned out the jury brought in a verdict for the defendants upon which judgment was entered, and we find no reversible error.

Sincerely yours,

ROGER A. STINCHFIELD,
Clerk.

RAS:wjs

Miss Dora Aberlin
11 Broadway
New York 4, New York

James Zisman, Esquire
121 Marjorie Road
Stoughton, Mass.